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**LAW OF DEFAMATION**

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**VERBAL INJURY**

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A HANDBOOK  
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F. T. COOPER, M.A., LL.B., ADVOCATE  
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EDINBURGH  
WILLIAM GREEN AND SONS  
Law Publishers  
1894



## PREFACE

THE frequency with which the Law of Defamation is at the present day invoked is my excuse for writing this book. No Scots work exclusively devoted to the subject has been published since that of Mr. Borthwick, which appeared nearly seventy years ago. Since then this branch of the law has been expiscated in our Courts to a far greater extent than ever previously. The decisions on the subject, however, are difficult of access by mere reference to Digests. Recently Mr. Glegg's work on Reparation (to which I gladly acknowledge my great indebtedness) has cast a flood of light on the darkness in which the matter was involved. But Mr. Glegg's treatise did not pretend to be exhaustive of the subject, into the more minute details of which it did not enter. In this book I have tried to show all that the Scots authorities have laid down, or even hinted at, in this department of jurisprudence. In some instances cases have been cited in support of propositions, not because they are express decisions in point, but because they are examples illustrative of them. It seemed expedient to do this where no express authority was to be found; for, in its absence, mere precedent must be of some avail. I have avoided as far as possible the citation of English law, as, owing to

material differences in the two systems, it is often not to be relied on as a guide in the questions treated of. I should, however, display singular ingratitude towards the sources of the information which I give relative to the English law were I to fail to admit how much I owe to the great works of Odger and of Folkard, and to Mr. Hugh Fraser's admirable little handbook on the subject.

F. T. C.

15 CHARLOTTE SQUARE, EDINBURGH,

*October 1894.*

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# CHAPTER I

## INTRODUCTORY

Definition of defamation—Malice not basis of action for defamation—Media through which defamatory imputations are made: (a) Language; (b) Pictures, statuary or effigies; (c) Acts—Solatium for injured feelings allowed by Scots law—Consequence—Otherwise in England—Action for defamation purely civil—Treason, blasphemy, and indecent expressions—Actions for defamation cognisable in Court of Session or Sheriff Courts—Main differences between Scots and English law on defamation.

DEFAMATION in its widest sense is injurious imputation. In a narrower sense it is used to mean injurious imputation against the character, and, more particularly, the moral character of persons. But there may be defamation of the quality of property, or of the title to it. “It may be that to “confine the use of the word slander to cases where the “language complained of is obviously and on the face of it “defamatory and injurious would be convenient, but I should “rather have thought that all actionable words which are “either injurious to the character or the credit of the person “of whom they are spoken, or which expose the person with “reference to whom they are uttered to public hatred and “contempt, are defamatory or slanderous words.”

Definition of defamation.

p. L. Kinnear—*Waddell v. Roxburgh*, 31 S.L.R. 721.

By the law of Scotland persons who complain that they, or property in which they are interested, have been defamed,

are in certain circumstances entitled to damages from the utterer of the defamatory matter.

*Stair*, i. 9, 4.

*Bankt.* i. 10, 24.

*Ersk.* iv. 4, 80.

Malice not  
basis of action  
for defama-  
tion.

It has often been laid down in decisions that the foundation of the action for defamation is the malice involved in the use of the defamatory words. But this is a worthless legal fiction which has only been bolstered up, not very successfully, by giving to the word malice a technical meaning different from its ordinary sense. The true basis for allowing action for defamation is the injury which persons will presumably suffer from having certain imputations made against them. In unprivileged cases, though there be absolutely no malice, damages are due.

See *L. Ivory—Outram v. Reid*, 14 D. 577.

*Brett, J.—Shepherd v. Whitaker*, L.R. 10 C.P. 502.

Media through  
which defama-  
tory imputa-  
tions are made.

Defamatory imputations may be made through three *media* — (a) by language; (b) by pictures, statuary or effigies; and (c) by acts.

(a) Language.

(a) Defamatory imputations are most commonly made by language either spoken or inscribed. In English law spoken defamation is called slander, and inscribed defamation libel; and in certain cases language uttered as a libel is actionable when it is not so when uttered as a slander.

*Odger*, 1-3.

But the Scots law does not recognise the distinction.  
*p. L. J. C. Inglis.*

*Brownlie v. Thomson*, 21 D. 480.

The institutional writers, it is true, call slander a verbal injury, while libel is described as a real injury.

*Bankt.* i. 10, 21, 24, 32.

*Ersk.* iv. 4, 81.

But no results follow from the distinction. As a rule, a person

who has been libelled will be entitled to greater damages than one who has been merely slandered. *Vox emissa volat, litera scripta manet*. But, in Scots law, language is either defamatory or not, and its being spoken or inscribed makes no difference in the consideration of whether it is defamatory. The words slander and libel are, however, very useful to describe shortly what is defamatory; they are frequently used in Scotland, and will be so in this book, but without the technical meaning attached to them in England.

Language may be inscribed either in writing or print, or in any other manner which renders it legible, and it may be inscribed on any material.

(b) Defamatory imputations made by pictures, statuary or effigies. No instance is recorded in Scotland of defamation having been effected through this medium. In England cases of this sort have occasionally occurred.

(b) Pictures, statuary or effigies.

*Du Bost v. Beresford*, 2 Camp. 511, 11 Rev. Rep. 782.

*Eyre v. Garlich*, 42 J.P. 68.

*Monson v. Tussauds*, L.R. 1894, 1 Q.B. 671.

And there can be no doubt that if similar cases arose in Scotland, the Court would hold a person entitled to sue for defamation effected by one or other of these means.

(c) Defamatory imputations conveyed by acts. "Suppose (c) Acts. "a man only so much as holds up his finger to you, if you offer to prove that he meant by that to make an imputation on your character that is relevant." p. L. Cockburn.

*Kennedy v. Allan*, 10 D. 1293.

In that case the pursuer complained that the defender had conveyed to the pursuer's business connections the impression that he was a common informer by circulating among them a letter from the authorities asking the defender to show cause why he (the defender) should not be proceeded against for having granted an unstamped receipt to the pursuer. Here it was the act of circulating the letter, and not the

letter itself, which was founded on as being defamatory. Several cases have occurred in Scotland where, although the action arose out of the use of language, the defamatory imputation did not lie in the language *per se*, but rather in the act of using it.

*M'Donald v. M'Donald*, Borth. 388.

*N. of Scotland Bank v. Duncan*, 19 D. 881.

*Richards v. Chisholm*, 22 D. 215.

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

And the act complained of may be one of omission, as by missing out an address in giving a list of bankrupts, whereby a person of the same name and trade, and residing in the same town as a bankrupt, has suffered loss, being thought to be the bankrupt.

*Outram v. Reid*, 14 D. 577.

Solatium for  
injured feelings  
allowed by  
Scots law.

By the Scots law a person who complains of defamation of his character is entitled to damages by way of *solatium* for injured feelings, though no possible pecuniary loss may have ensued from the utterance of the defamatory matter.

Consequence.

The consequence is, that words uttered, or writing sent, to the pursuer alone will ground an action for defamation, and will entitle the pursuer to damages for his injured feelings.

*Mackay v. M'Cankie*, 10 R. 537.

*Stuart v. Moss*, 13 R. 299.

Otherwise in  
England.

This is a feature of the Scots law which distinguishes it from the English, in which there must be publication to a third party. *p. M. R. Esher.*

*Pullman v. Hill*, L.R. 1891, 1 Q.B. 524.

Action for  
defamation  
purely civil.

In Scotland the action for defamation is now purely civil, though it formerly was also criminal.

*Borthwick on Libel.*

Treason,  
blasphemy,  
and indecent  
expressions.

If a defamatory utterance contains treasonable, blasphemous, or indecent expressions, the person making it is liable in criminal penalties, but this is not because it is defamatory,



but because it is treasonable, blasphemous, or indecent. It is no purpose of the present work to deal with such utterances.

Actions for defamation can be instituted either in the Court of Session, when they are usually tried by jury, or in the Sheriff Courts, when they are tried before the judge without a jury.

Actions for  
defamation  
cognisable in  
Court of  
Session or  
Sheriff Courts.

*Forrest v. Crichton*, 14 F.C. 48.

The main points of difference between the Scots and English law on defamation are three. First, the Scots law does not draw the distinction between libel and slander made in England. Second, it grants *solatium* for injured feelings, and consequently publication to the person defamed alone is sufficient to ground the action, while in England the publication must be to a third party. Third, the action is purely civil in Scotland, while, in England, defamation may, in certain cases, result in criminal proceedings.

Main differ-  
ences between  
Scots and  
English law on  
defamation.

## CHAPTER II

### DEFAMATION PROPER AND VERBAL INJURY

Imputations of two species : (1) Those properly defamatory ; (2) Verbal injuries—Three characteristics of defamation proper : (a) Imputations held naturally injurious ; (b) Imputations presumed false ; (c) No special damage need be proved—Verbal injury—Definition—Three characteristics of verbal injury : (a) Imputation must be proved false ; (b) Imputation must be made without lawful occasion ; (c) Damage must be proved—General damage usually sufficient—When general, and when special, damage must be proved—Special damage must be proved in slander of title ; and probably in defamation of property.

Imputations of two species. INJURIOUS imputations are of two distinct species.

(1) Those properly defamatory.

(1) There are those which in terms more or less clear convey a direct aspersion on a person's character. To this species the term defamatory is more particularly applied.

(2) Verbal injuries.

(2) There are those which do not convey an aspersion on a person's character, but which can be proved to have caused a person injury. These imputations are known as verbal injuries ; although they, like other imputations, can be made not merely by language but also by the other *media* mentioned at p. 3.

Three characteristics of defamation proper.

(a) Imputations held naturally injurious.

(1) Defamatory imputations proper have three characteristics.

(a) They are such as, in law, are held as naturally injurious to repute, or hurtful to the feelings. Examples of this class of imputations are given, *infra*, pp. 34-82.

- (b) Being held as naturally injurious to repute or hurtful to the feelings, they are presumed to be false, unless the contrary is proved. (b) Imputations are presumed false.
- (c) A person complaining that any of these has been applied to him does not require to prove any special loss to entitle him to damages from the person uttering the imputation. (c) No special damage need be proved.

It used to be said that in actions for defamation injury requires to be proved. Thus in the case of

*Tytler v. Mackintosh*, 3 Mur. 236,

L. Pitmilley (p. 253), in drawing the distinction between privileged and unprivileged utterances, lays down that injury requires to be proved in both circumstances. Again in

*Maclean v. Fraser*, 3 Mur. 353,

the L. C. C. Adam (p. 356), also in distinguishing privileged and unprivileged cases, says that injury requires to be proved in these actions.

These two *dicta* may be regarded as *obiter* on the point whether, if language is naturally defamatory, injury requires to be proved by the person complaining of it. The judges were really pointing at the necessity, in privileged cases, of positively averring previous malice, and must not be taken as definitely pronouncing on what must be proved in all cases where language is naturally defamatory. In

*Mackellar v. Duke of Sutherland*, 24 D. 1124,

L. J. C. Inglis when charging the jury and in distinguishing between privileged and unprivileged cases said: "In ordinary actions of slander the words spoken or written by the defender being in themselves defamatory and actionable the law presumes them to be false, and also presumes the motive of the person speaking or writing them to be malicious." He then points out that the case before him was privileged, the matter complained of having been uttered in a court of law, and then proceeds: "If the pursuer could satisfy

“ the Court that the statement is impertinent, then the  
 “ defender would not be entitled to make it; and if it is  
 “ defamatory he would be answerable in damages for making  
 “ it.”

A few years previously L. Fullerton in

*Outram v. Reid*, 14 D. 577,

speaking of imputations of bankruptcy, said: “ Proof of  
 “ special damage may of course increase the amount of the  
 “ injured party’s claim. But the false announcement of the  
 “ bankruptcy of a trader, or indeed of anybody, is obviously  
 “ in itself a ground of action and the foundation of a claim  
 “ of damage—the amount of course left to a jury or the Court  
 “ acting as a jury in disposing of the claim.” But all doubt  
 as to whether there need be proof of special damage to entitle  
 a person to recover damages for utterances against him  
 properly defamatory is removed by the fact that damages  
 will be allowed for an imputation uttered only to the party  
 complaining of it.

*Mackay v. M’Cankie*, 10 R. 537.

It may therefore be accepted as law that a person com-  
 plaining of an imputation properly defamatory is entitled to  
 damages without proof of special loss though he may augment  
 them by such proof. This is the English law as to libel.

*Ratcliffe v. Evans*, L.R. 1892, 2 Q.B. 524.

(2) Verbal  
 Injury.

(2) The cases of verbal injury reported in the Scottish  
 books are few in number, and the law on the subject has not  
 been much elucidated. In fact the present Lord President  
 (Robertson) was the first judge to clearly recognise and justly  
 appreciate its place in our law. But L. P. Robertson only  
 dealt with one phase of it in

*Paterson v. Welch*, 20 R. 744,

where he said: “ It seems to me that when speech is ascribed  
 “ to A by B, A will have an action if (1) the statement of  
 “ B is false; (2) the statement was made with a design to

"injure, and (3) injury has resulted." The law would seem to be that any language uttered (or acts done), though not properly defamatory, by B, without lawful occasion, which A can prove is false (or, in the case of acts, misleading) and which A can further prove has caused him injury, can found an action for damages by A against B. At the same time the remarks of the judges in

Definition.

Three characteristics of verbal injury.

*Waddell v. Roxburgh*, 31 S.L.R. 721,

must be looked at, if for nothing else, as showing the state of uncertainty of the judicial mind on this subject. There can be little doubt that that case was rightly decided, but the opinions expressed in it in great measure tended to weaken the principle established in *Paterson's* case. The three elements in verbal injury are therefore—

- (a) That the language complained of is false (or the acts done misleading).
- (b) That the language was uttered (or the acts done) without lawful occasion.
- (c) That injury has actually resulted to the complainer from the utterance of the language or the performance of the acts.

(a) In verbal injury the Court will not hold the language or acts complained of as naturally injurious to the complainer. The words used, even though innuendoed, cast no imputation on the pursuer of a properly defamatory nature. It results from this, that the language, being innocuous in itself, the Court is not entitled to presume that it is false, for no one should be presumed a liar unless he is saying what detracts from another's repute. Language, therefore, which is innocuous must be proved to be false by the person who is complaining of its effects.

(a) Imputation must be proved false.

(b) It may very well be questioned whether a person complaining of verbal injury should have to prove anything beyond the falsity of the language complained of and the

(b) Imputation must be made without lawful occasion.

damage he has sustained through its being used. If the language is false and has done damage, why should the utterer be shielded from liability unless it is proved that he used the language with the design to injure? A plea of "no intention" is not looked at in other species of actions for reparation. If A's carriage runs over B, it is not a defence to A that he had no intention to do the harm, nor is B compelled to prove that A ran over him intentionally. Nor is B compelled to prove that A had no lawful occasion for driving over him. If A has done the damage, it is for him to show that it was unavoidable. But it is obvious that if the law were to allow an action for damages to every party who could prove some remote injury traceable to an untrue statement made by another, persons would be liable to most unjust and oppressive suits. Life would be unbearable if one were liable in damages for every inaccurate statement which some one else could prove had caused him loss. At the same time no one is more entitled to scatter broadcast untruths which cause injury, than he is to throw about lighted torches which cause conflagrations. In this view the law must aim, on the one hand, at not hampering the right of freedom of speech and at being lenient to the human frailty of inaccurate language, and, on the other hand, at protecting persons who may be sufferers from the careless use of words. It seems therefore necessary in verbal injury for a person complaining of loss to prove that the language was uttered without lawful occasion. The L. P. in

*Paterson v. Welch*, 20 R. 744,

says that the statement must be proved to have been made with the "design to injure," but it is respectfully submitted this is not so. The issue granted in that case was one asking whether the statements complained of held the pursuer up to public hatred and contempt; and the L. P. in holding that design to injure must be proved, appears

to have had the express statement of the late L. P. Inglis to that effect in

*Cunningham v. Phillips*, 6 M. 926,

laid before him. But the basis of an action for verbal injury is rather negligence than malice. This appears to be borne out by the case of

*Outram v. Reid*, 14 D. 577.

That was not a case of defamation proper. It was an instance of injury to repute arising out of an act of omission. A newspaper copied from the *Gazette* the lists of bankrupts. It failed, however, to give, as the *Gazette* did, the addresses of the bankrupts. A person of the same name, carrying on the same trade in the same town as a bankrupt announced in the paper, sued the paper for damages on the ground that people had mistaken the announcement as applying to him. On the footing that the paper failed in the reasonable precaution of specifying, as the *Gazette* did, the address of the bankrupt, and that in consequence it was a reasonable and natural result that people should think the announcement applied to the pursuer, damages were awarded. In that case L. Ivory expressly said: "I am quite satisfied . . . that "there was no malice or *animus injuriandi*." There was, however, neglect by which words really intended to apply to one were liable to be understood as applying to another. There was in fact no lawful occasion for the omission, and the result was injury. Again in

*Philip v. Morton*, Hume 865,

the L. P. Hope said that *mala fides* is not necessary to give claim for reparation of damage actually done. The view that absence of lawful occasion rather than presence of wilful intention is what the pursuer needs to prove in actions for verbal injury is supported by the *dicta* of English judges. Thus in *Western Counties Manure Co. v. Lawes Chemical Manure Co.*,

L.R. 9 Ex. 218,

both B. Bramwell and B. Pollock seem to consider lawful cause, or lawful occasion, as justifying an injurious statement not properly defamatory. Again in

*Halsey v. Brotherhood*, L.R. 19 C.D. 386,

Baggallay, L. J., said: "It seems to me that an action for "slander of title will not lie unless the statements made by "the defendant were not only untrue, but were made without "what is ordinarily expressed as reasonable and probable "cause." In that case the judges were equally clear that a statement not properly defamatory, although untrue and causing damage, would not entitle the injured party to damages unless it were also uttered without reasonable cause or lawful occasion.

(c) Damage must be proved.

(c) As in verbal injury the statements or acts complained of are not in themselves in the eye of the law injurious, that they have caused damage must be proved. Damage is of two kinds, general and special. In defamation proper, the law presumes general damage from the mere utterance of the defamatory statement or performance of the defamatory act. In most cases of verbal injury it seems to be enough to positively prove general damage, and this was so held in the case of

General damage usually sufficient.

*Outram v. Reid*, 14 D. 577.

But there are probably cases where it will be necessary to prove special or specific loss before damages will be allowed. The line of demarcation between cases of verbal injury where it is sufficient to prove general, and those where it is necessary to prove special damage—lies probably in this, viz., where the verbal injury amounts to an imputation which would have been properly defamatory of the pursuer if directly applied to him, it is sufficient to prove general damage. So in

When general and when special damage must be proved.

*Outram v. Reid*, 14 D. 577,

if the announcement of bankruptcy had been really directed against the pursuer it would have been properly defamatory,



and therefore the pursuer was held only obliged to prove general damage. But if the verbal injury complained of never applied to the pursuer, and the pursuer merely contends that although not applicable to him it has injuriously affected him, special damage must be proved. To take a case suggested by L. Deas in

*North of Scotland Bank v. Duncan*, 19 D. 881.

If A says of B's sister that she is unchaste and the statement be untrue, and uttered without lawful occasion, and B says she is injured by it, B would probably have to prove specific loss before she could obtain damages, although if her sister sued, the latter would be presumed to have suffered general damage. It would also appear that in what is known as slander of title, *i.e.* when one person falsely says that another is not the owner of certain property, the pursuer must prove special damage.

Special damage  
must be  
proved in  
slander of title.

*Philip v. Morton*, Hume 865.

There would seem to be no appreciable injury to a person in saying that he was not the owner of a particular thing, but if he is seeking to sell the article, he may lose his market by his ownership being called in question. It is not properly defamatory of a person to say he is not the owner of an article, and if he complains of such a statement he must prove his loss.

It would also seem necessary to prove special damage when the pursuer complains of defamation of his property. Thus no injury could be instructed by a gentleman whose carriage horses had been disparaged, but if he could show that he had wanted to sell them, and that, owing to a false statement, made without lawful occasion, they had failed to fetch their proper value, he might be able to recover the loss sustained from the person making the statement. This view is supported by the English case formerly cited.

And probably  
in defamation  
of property.

*Ratcliffe v. Evans*, L.R. 1892, 2 Q.B. 524.

## CHAPTER III

### PERSONS WHO CAN SUE

Persons entitled to sue—Persons unnamed—Persons pointed at by letters of the alphabet—Persons pointed at by their office—One of a number defamed—An incorporation—A partnership—A limited company—A partner in a company—Plurality of pursuers for single defamatory utterance—Plurality of pursuers in one action for separate defamatory utterances—Representatives of persons defamed: widow, colonel of regiment, son, tutor-at-law of child, personal representatives—Imperfect title to sue: pupil, minor, married woman, separate from husband, after husband's death, lunatic—Bankrupt—May require to find caution.

Persons  
entitled to sue.  
Persons un-  
named.

ANY person alleging himself hurt by defamation or verbal injury has a title to sue. The person need not be actually named in the alleged libel in order to give him a title, if he offer to prove that the libel was intended to apply to him,

*Godfrey v. Thomsons*, 17 R. 1108,

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326,

and it appears that evidence of "general belief and impression" that the libel applies to the pursuer is sufficient to entitle him to recover damages.

*Smith v. Gentle*, 6 D. 565.

Persons  
pointed at  
by letters of  
the alphabet.

It naturally follows that a person who is actually pointed at by putting certain letters of his name with interspaces into the alleged libellous document can sue,

*Jardine v. Creech*, M. 3438,

By their office. and a person pointed at by indicating the office which he holds.

*Beattie v. Mather*, 22 D. 952.

But a person not named in the libel cannot sue if there is nothing in it to point to its applying to him, and he does not offer to prove facts which would show that it really did.

*Caldwell v. Munro*, 10 M. 717.

It would seem that any person of a number about whom generally a defamatory statement has been uttered may sue in respect of it. One of a number defamed.

*M'Fadyen v. Spencer & Co.*, 19 R. 350.

But probably this rule is limited, and it must be held to apply only in cases where a specific accusation is made against a limited class. Otherwise if A were to say of the tailors of Edinburgh that they were all thieves, any one of them, under the rule as stated, would have a right of action.

An incorporation can sue for a libel on it. This proposition was first sustained in the case of An incorporation.

*Society of Solicitors v. Robertson*, M. 13935,

and in

A partnership.

*M'Vean & Co. v. Blair*, Hume 609,

a company though not incorporated was allowed to sue for libel. These cases have been followed by

*North of Scotland Bank v. Duncan*, 19 D. 881

(where L. O. Ardmillan expressly held that a banking company could sue for alleged defamation), and by

*British Legal Life Assurance & Loan Co., Limited v.*

*Pearl Life Assurance Co., Limited*, 14 R. 818,

where a limited company was held entitled to sue. But an incorporation cannot sue for words which appear not to have been used against it as a corporate body, but against individuals belonging to it. Limited company.

*Fleshers of Dumfries v. Rankine*, 19 F.C. 224.

Nor can it sue, it would appear, when the imputation made against it is of having done something which it is impossible for an impersonal entity to do.

*Mayor of Manchester v. Williams*, L.R. 1891, 1 Q.B. 94.

A partner in a company. A partner in a joint stock company can sue separately for the injury done to him by accusations against the company,

*Hustler v. Allan*, 3 D. 366,

and that even when he is not mentioned in the accusations as being a partner.

*Williams v. Allan*, 3 D. 600.

Plurality of pursuers for single defamatory utterance. Two or more persons can sue together for a single alleged libel by which they aver that they are injured, provided (1) that they conclude for damages to each separately, and (2) they put in separate issues.

*Ritchies v. Barton*, 10 R. 813.

*Harkes v. Mowat*, 24 D. 701.

*Hendersons v. Henderson*, 17 D. 348.

*Young v. Inglis*, Hume 608.

*Graeme v. Cunningham*, M. 13923.

*Scotlands v. Thomson*, M. App. Delinq. 3.

And if the defamatory statement in its terms applies to only a single person, two or more will be allowed, under the same conditions, to conclude in one action for damages for its utterance, if it may be applicable to any one of them.

*Mitchell v. Grierson*, 21 R. 367.

Plurality of pursuers in one action for separate defamatory utterances. Representatives of persons defamed. In one case two persons sued together for separate libels on them by one individual.

*Lowthers v. Rae*, Hume 592.

Persons are sometimes allowed to sue as representatives of others for libel on the latter. The earliest case of this sort in the law of defamation is

*Watsons v. Smeaton*, Hume 624,

Widow for husband. where a widow and children were allowed to sue for an alleged libel on their deceased husband and father. The next case is that of

Colonel for regiment.

*Shearlock v. Beardsworth*, 1 Mur. 196,

where a lieutenant-colonel was allowed to sue for a libel on his regiment. The case of

Son for father.

*Walker v. Robertson*, 2 Mur. 508,

is somewhat different, for there a son seems to have been allowed action for a libel on his dead father on the footing that the son's own feelings might be injured, and that he was thus entitled to *solatium* for the libel on his father. The L. C. C. there said that the jury were "to consider whether the statements were not such as ought to affect, and were likely to affect, the feelings of a son. . . . Even a matter of history may be a subject for claiming damages if it is injurious to descendants." In another case the question was raised, but not decided, whether a person was entitled to sue for a statement that her father was a footman and her mother kept a brothel.

*Symmond v. Williamson*, M. 3435.

In the case of

Tutor-at-law of child for father.

*Tullis v. Crichton*, 12 D. 867,

the tutor-at-law of the only child of a person was allowed to insist in a libel action begun by the deceased father. But the person really *in titulo* to insist in an action for libel upon a dead party is his personal representative.

Personal representative of deceased.

*Hagart's Trustees v. Hope*, 1 S. 46.

*Auld v. Shairp*, 2 R. 191.

It is doubtful whether a personal representative has title, however, to sue for damages merely by way of *solatium* to the dead person's feelings. See the L. J. C.'s opinion in the last cited case.

Some person's right to sue is incomplete in itself, and requires another's to make it perfect. Thus a pupil cannot sue alone, Imperfect title to sue. Pupil.

*Bell's Pr.* s. 2067,

and a minor should sue with consent and concurrence of his or her guardian. Minor.

*Watson v. Burnet*, 24 D. 494.

Unlike the English law as it stood till recently, in Scotland a woman can sue for an imputation on her virtue without proof of special damage.

*Ramsay v. Nairne*, 11 S. 1033.

*Watson v. Burnet*, 24 D. 494.

Married  
woman.

A married woman sues with consent and concurrence of her husband,

*Gales v. Bennett*, 19 D. 665,

Separate from  
her husband.

and if the woman is living apart from her husband, the Court would appoint a *curator ad litem*,

*Cullen v. Ewing*, 10 S. 497 ; 6 W. & S. 566,

though probably since the Married Women's Property Act 1882, a woman in that position might sue without one. Under the common law the wife's claim for damages, arising in the husband's lifetime, passed *jure mariti* to the husband, and therefore if it were not put forward till after the husband's death, it was stateable by his representatives, and not by the widow.

After hus-  
band's death.

*Milne v. Gould's Trs.*, 3 D. 345.

This defence to an action for damages for libel by a widow does not seem to have been pleaded in

*Smith v. Stoddart*, 12 D. 1185,

which was decided on other grounds in favour of the defender. But since the passing of the Married Women's Property Act 1882, a wife's claim for damages is part of her own estate, and is enforceable by her whether her husband is alive or dead.

Lunatic.

No case of an admitted lunatic suing for defamatory statements about him is reported in the Scots books. But the instance would be that of his tutor-at-law if he had one, and if he had not, a *curator bonis* would be appointed on petition to the Court, in whose name the action would be raised.

*Mackay's Manual*, 149.

No action for defamation at the instance of a notorious

lunatic is reported in our books, and such actions are very unlikely to be raised by guardians for imputations on the moral character of their lunatic wards ; but it might be the duty of guardians to raise an action where the lunatic is interested in a business, and the imputation was against it.

Defamation being a peculiarly personal injury, the right Bankrupt. to sue in respect of it may be asserted by a bankrupt without his trustee insisting.

*Thom v. Bridges*, 19 D. 721.

L. Young has even expressed the opinion that the right to sue in such an action does not pass to the trustee at all,

*Scott v. Johnston*, 12 R. 1022,

and this view is in concurrence with the English law.

*Ex parte Vine*, L.R. 8 C.D. 364.

But any damages obtained by a bankrupt pass to his trustee.

*Jackson v. M'Kechnie*, 3 R. 130.

But although a bankrupt may sue for defamation, it is in the discretion of the Court in all cases to say whether he shall proceed without finding caution. May require to find caution.

*Clark v. Muller*, 11 R. 418.

In

*Scott v. Johnston*, 12 R. 1022,

the Court refused to ordain an undischarged bankrupt suing for defamation, to find caution. And a similar decision was given in an action by a notour bankrupt living in England, in

*Macrae v. Sutherland*, 16 R. 476.

## CHAPTER IV

### PERSONS LIABLE TO BE SUED

Persons propagating defamation—Unconscious propagation—Two or more propagators — Printer, editor, author, publisher—Agent—Client for agent's defamation — Husband for wife—Principal and agent — An associated body—Partnership—Limited company—Railway company—A club—An unincorporated society—Church Courts—Persons not liable for those they do not control—Nor for fellow-servant—Pupil—Minor—Lunatic—Executors of utterer—Person taking over business—Jurisdiction over foreigners.

Persons propagating defamation.

ANY person propagating a libel renders himself subject to an action of damages at the instance of the person injured.  
*p. L. P. Hope, p. 1129.*

*Marshall v. Renwick, 13 S. 1127.*

Unconscious propagator.

But a mere unconscious disseminator will not be liable. And thus a newsvendor who is ignorant of the contents of the papers he sells, and whose ignorance is not due to negligence, will not be responsible for defamatory matter in the papers sold by him.

*Emmens v. Pottle, L.R. 16 Q.B. D. 354.*

Two or more propagators.

Two or more persons may be sued together, with a separate conclusion against each, for a libel, in the utterance of which both participated.

*Keay v. Wilsons, 5 D. 407.*

And where there is alleged to have been concert and concurrence between persons to libel another, they may be sued "conjunctly and severally."

*Wilson v. Weir, 24 D. 67.*



*McBride v. Williams*, 7 M. 427.

*McMurchy v. Campbell*, 14 R. 725.

*Jack v. Fleming*, 19 R. 1.

But persons cannot be made jointly and severally liable if it appear that the alleged acts of defamation were not done by them jointly.

*Young v. Leven*, 1 S. App. 179; 1 Mur. 350.

It follows from the liability of every propagator of a libel in damages for his act, that a person who has sued, say, the printer of a libel, can also proceed against the author or editor of it. Printer, editor, author.

*Gibson v. Cheap*, 3 Mur. 273.

*Fair v. Barclay*, 12 S. 565.

*Lowe v. Taylor*, 5 D. 1261.

*Richards v. Chisholm*, 22 D. 215.

*Ogilvy v. Paul*, 11 M. 776.

Or, in another view, both the formulators, the transmitters, and the publishers of a libel can be sued.

*Torrance v. Leaf*, 13 S. 72.

*Edwards v. Begbie*, 12 D. 1134.

*Milne v. Walker*, 21 R. 155.

They can be sued conjunctly and severally, or severally, and according to their respective liabilities,

*Adie v. Gowans*, 9 D. 495,

or simply conjunctly and severally,

*Macfarlane v. Black & Co.*, 14 R. 870,

or the pursuer may sue each wrong-doer in a separate action.

The fact that a person is agent for another will not relieve him from liability personally for libel uttered by him when acting as agent. Thus a law agent is personally responsible for defamatory matter put on record by him, Agent when acting as such.

*Yeats v. Ramsay*, 4 S. 275,

and for letters written in his client's interests,

*Wilson v. Purvis*, 18 R. 72.

But a person cannot be sued "as legal adviser or abettor of "that paper" (in which the libel had appeared), "or as held "or believed or understood to be concerned in it."

*Morthland v. Cadell*, 4 Pats. Apps. 385.

Client for  
agent.

On the other hand, a client is not liable for defamatory matter inserted on record by an agent without the client's knowledge or instruction,

*Watsons v. Smeaton*, Hume 624,

*.Yeo v. Wallace*, 5 S.L.R. 253,

and it is a question whether a mandatory is responsible for defamatory matter in judicial proceedings,

*Davidson v. Megget*, 1 S. 3,

Debt collector.

though undoubtedly he will be if he instructs or knowingly permits it to be inserted. A debt collector is not liable for mistakes of a law agent whom he has instructed to sue for a debt which the debt collector is collecting, because he is merely an intermediary.

*Taylor v. Rutherford*, 15 R. 608.

But a client can be sued for libellous instructions given to his agent and published by the latter.

*Williamson v. Umphray*, 17 R. 905.

Husband for  
wife.

In libel a person is only answerable for his own act, or that of his agent, within the scope of his authority. This is exemplified not only by the decisions quoted above as to the non-liability of clients for unauthorised libels by their agents, but also by the fact that a husband is not liable for defamation uttered by his wife so long as he does not join in it.

*Milne v. Smiths*, 20 R. 95.

*Martin v. Murray*, Hume 619.

*Barr v. Neilsons*, 6 M. 651.

But a husband who adopts his wife's libel can be sued, and damages will be assessed against him separately.

*Scorgie v. Hunter*, 9 S.L.R. 292.

As a husband is not responsible for his wife's libels, he is not

responsible for her expenses in defending libel actions except to the extent that his conduct of the defence has been "malicious, vexatious, and calumnious."

*Douglas v. Chalmers*, 3 Pats. App. 213.

It must be observed also that a husband cannot be concluded against "conjunctly and severally" with his wife for a single sum in respect of separate libels uttered by each.

*Barr v. Neilson's*, 6 M. 651.

But if a person in the conduct of his business employs servants, and they, in performing the business, utter libels, the employer is responsible, although he may never have known of the libel. This is exemplified by no express decision, but a whole series of cases, particularly against the proprietors of newspapers, have arisen, where persons were held liable who certainly were not personally implicated in the publication of the defamatory matter. L. P. Inglis's judgment in

*British Legal, etc. Co. v. Pearl Life, etc. Co.*, 14 R. 818, casts some doubt on the proposition, and suggests that persons will not be responsible for libels uttered by their agents without their knowledge, but his remark is *obiter*, and cannot be supported. In the case of

*Rarity v. Stubbs*, 1 S.L.T. 74,

the liability of principal for agent was admitted.

It thus follows that an associated body is liable for defamation uttered in its name. The first instance of this kind is to be found in

*Memis v. Managers of Aberdeen Infirmary*, M. App. Delinq. 2. Since then numerous cases against such bodies have been entertained. Thus a firm was sued in

*Hustler v. Allan & Watson*, 3 D. 366.

*Gordon v. British & Foreign Metaline Co.*, 14 R. 75.

*Gudgeon v. Outram & Co.*, 16 R. 183.

A limited company in

Principal and agent.

An associated body.

A partnership.

A limited company.

*British Legal Life Assurance & Loan Co., Limited v.*

*Pearl Life Assurance Co., Limited*, 14 R. 818.

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

A railway company.

A railway company in

*Buchan v. N. B. Railway Co.*, 21 R. 379.

A club.

A club in

*Blasquez v. Lothians Racing Club*, 16 R. 893.

An unincorporated society.

And an unincorporated society in

*Gray v. Scottish Society for Prevention of Cruelty to Animals*, 17 R. 1185.

In this case the society was sued in name of its chairman and directors, trustees and secretary.

Church Courts.

A Church Court, either of the Established or a Dissenting Church, is liable to be sued for acts done by it as a prosecutor.

*Smith v. Presbytery of Auchterarder*, 12 D. 1282.

*Edwards v. Begbie*, 12 D. 1134.

Persons not liable for those they do not control.

A person or public body will not be liable for any defamatory accusation made by persons who are not under his or its control, although they may be paid and maintained by that person or public body. Thus although the Magistrates and Police Commission of Glasgow are bound to maintain a police force, the control of that force is in the hands of a special statutory committee, and the Magistrates and Police Commission are not therefore liable for any defamatory charges made by the members of the police force, which they merely maintain.

*Young v. Magistrates of Glasgow*, 18 R. 825.

Nor for fellow-servants.

And in like manner fellow-servants are not liable for each other's statements made in performance of their duties to their master, and thus the manager of a railway company is not responsible for a defamatory statement made by one of his clerks in the course of the company's business, but without instructions from the manager.

*Milton Chemical Co. v. M'Dougall*, 2 S.L.T. 67.

Pupil.

The question whether a pupil can be sued for defamation

has never been decided. L. Mansfield seems to have said, if an infant commit an assault or utter slander, God forbid that he should not be answerable for it in a court of justice. *p. Kenyon, C. J.*

*Jennings v. Rundall*, 8 T.R. 335, 4 R.R. 680,  
and in

*Woolnoth v. Meadows*, 5 East 463, 7 R.R. 742.

Lawrence, J., indicated an opinion that action for slander would lie against a boy nine years old. It, however, would seem reasonable to hold that a pupil under seven years old, which is the age below which a child is not punishable for crime,

Hume 1, 35,

is not liable to be sued for defamation. If the pupil is liable above that age, it would also seem reasonable to take the fact of his pupillarity and the nature of his upbringing into consideration in fixing the damages payable by the pupil's estate. A pupil cannot be sued alone. His tutors must be called along with him.

*Mackay's Manual*, 166.

There is little reason to doubt that a minor may be sued for Minor. defamation. The action is raised against the minor, and his father as administrator-in-law, or his curators if he is under curatory. In the event of the legal guardians of pupils and minors refusing to defend, the Court will appoint a tutor or curator *ad litem* to do so.

*Mackay's Manual*, 168.

The question whether a lunatic is liable to be sued in an Lunatic. action for defamation was considered in

*Smith v. Maxwell*, Borth. 460,

where an opinion was indicated that a defender would not be liable for defamatory statements made in delirium. The defender seems to have been held liable in that case on the ground that he repeated the statements after recovery. In

England there is a *dictum* of Kelly, C. B., to the effect that a lunatic is liable for defamation.

*Mordaunt v. Mordaunt*, 39 L.J., P. & M. 57, but it is unsupported by authority. A distinction drawn in American law between defamation uttered by notorious lunatics and that where the utterer is slightly insane, though perhaps not philosophical, may prove reasonable. The Americans hold that notorious lunatics are not liable, while those slightly insane may be.

*Dickinson v. Barber*, 6 Amer. Decis. 58.

If lunatics are liable to be sued for defamation their curators must be called along with them, and when the lunatic has been cognosced it is sufficient to call the tutor as defender. If the lunatic has got neither tutor nor curator, the Court will sist procedure till a curator bonis has been appointed.

*Mackay's Manual*, 168.

Executors of  
utterer.

As the right to sue for defamation arises in the injured party the moment the defamatory matter is uttered, the death of the utterer makes no difference on the injured party's right, and the latter can make good his claim against the executors of the wrong-doer.

*Evans v. Stool*, 12 R. 1295.

Person taking  
over business.

And it has been held in the Outer House by L. Low, that if a person whose business is, *inter alia*, to circulate statements about the financial condition of merchants, transfers it with all its liabilities to a company which undertakes to meet them, it can be sued for a libellous circular issued by its predecessor.

*Henderson v. Stubbs, Limited*, 2 S.L.T. 87.

Jurisdiction  
over foreigners.

Liability to be sued in the Scottish Courts for libel in all cases rests on the defender being subject to the jurisdiction of the Court. It is unnecessary here to enumerate the grounds on which the Scottish Courts will exercise their jurisdiction. They depend mainly upon the defender having

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either a domicile or property in Scotland. The mere fact, therefore, that a person utters in Scotland a libel, will not give the Scottish Courts jurisdiction over him in an action for defamation. It was consequently held that the selling of a newspaper containing alleged libellous matter will not by itself render the printer or publisher, who is not resident and has no property in the country, liable in the Scottish Courts.

*Parnell v. Walter*, 16 R. 917.

## CHAPTER V

### MODES OF PUBLISHING DEFAMATORY MATTER

Form of publication immaterial—May be by direct assertion—Or as a question—Or allegorically—Or hypothetically—Or as a quotation—Or as a letter—Or by a series of attacks—Or as subject matter of a law suit—Or by a prosecution—Or by a sentence of excommunication—Or by a petition to Justices—Or as common report—Defamatory acts may be effected either by commission or omission—Publication effected when uttered to another by author—Even to person defamed—In England utterance by one spouse to the other is not publication—Defamation published though uttered in answer to a question—Or by breach of confidence—But not if uttered in delirium—Media of publication.

Form of publication of defamatory matter immaterial.

May be by direct assertion.

Or as a question.

PERSONS cannot shield themselves from liability for their defamatory utterances by disguising them in a particular form. The law looks to the substance of the words or acts, and if it is defamatory the utterer will not be protected because he has artfully disguised his libel. If defamation is effected by words, they may openly make a libellous statement, as when A says of B that he is a thief; or they may make a statement which, on the face of it, is susceptible of a double meaning, the one innocuous, the other libellous; or they may make a statement which appears to be not libellous, but which the person who complains of them may offer to prove had a specific libellous meaning in reality. In all these three instances the words are in form a direct assertion. But the words need not be put in an assertive form. They may be put as a question.

*Lockhart v. Cumming*, 14 D. 452.



*Carmichael v. Cowan*, 1 M. 204.

*Scott v. Johnston*, 12 R. 1022.

*M'Kercher v. Cameron*, 19 R. 383.

Or in an allegorical form. Thus, where a newspaper published an account of a supposed dream of the pursuer's to the effect that he had been engaged in a crime, he was allowed issues, asking whether the newspaper thereby represented that he had been engaged in the crime of which he was said to have dreamt. Or allegorically.

*Mackie v. Lawson*, 13 D. 725.

Or the libel may take the form of an hypothesis,

*Sexton v. John Ritchie & Co.*, 17 R. 680, 18 R.

(H. of L.) 20.

Or hypothetically.

Or of a quotation. *p. L. C. C. Adam.*

*Hamilton v. Hope*, 4 Mur. 222.

Or as a quotation.

Or of a letter which people will believe to have been written by the pursuer, and which would exhibit him as being anxious to incite to a crime. Or as a letter.

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

A libel may also be constituted by a series of attacks, none of which in itself is defamatory, but the effect of which taken together is so. Or by a series of attacks.

*M'Laren v. Ritchie*, Glegg on Reparation 497.

*Sheriff v. Wilson*, 17 D. 528.

*Cunningham v. Phillips*, 6 M. 926.

*Cunningham v. Duncan*, 16 R. 383.

The whole subject matter of a law suit may constitute a libel. Or as subject matter of a law suit.

*Gordon v. British & Foreign Metaline Co.*, 14

R. 75.

Or a prosecution by a procurator-fiscal.

*Craig v. Peebles*, 3 R. 441.

Or by a prosecution.

Or a sentence of excommunication by an episcopalian bishop.

*Dunbar v. Skinner*, 11 D. 945.

Or by a sentence of excommunication.

Or by a  
petition to  
justices.

Or a petition to Justices.

*Keay v. Wilsons*, 5 D. 407.

Or as common  
report.

And the fact that the alleged libel is merely a repetition of what others have said does not make it less a libel.

*Craig v. Jex Blake*, 9 M. 973.

*Thom v. Camerons*, Hume 646.

Defamatory  
acts may be  
either of com-  
mission or  
omission.

Acts of a defamatory significance may be either of omission or commission. Their effect is again all that is looked to by the law in judging of their character. The only instance of an act of omission being founded on to ground an action of defamation, in the law of Scotland, is one where a newspaper in giving from the *Gazette* the list of bankrupts omitted their addresses. A person in the same town, carrying on the same trade, and bearing the same name as an actual bankrupt, founded on this omission, and complained that through it the announcement in the paper had been read as applying to him. He was held entitled to damages.

*Outram v. Reid*, 14 D. 577.

With regard to acts of commission, the law is summed up by L. Cockburn in his words, "Suppose a man only so much as " holds up his finger to you, if you offer to prove that he " meant by that to make an imputation on your character, " that is relevant."

*Kennedy v. Allan*, 10 D. 1293.

Publication  
effected when  
uttered to  
another by  
author.  
Even to person  
defamed.

Publication of a libel is effected the moment the defamatory matter is imparted to another by its author, even though it only be to the person libelled. Thus libellous matter only communicated to the person defamed, in Scotland, entitles him to an action for *solatium* for injured feelings.

*Hutchison v. Naismith*, M. App. Delinq. 4, 14 F.C. 143.

*Paul v. Jackson*, 11 R. 460.

*Stuart v. Moss*, 13 R. 299.

*Ramsay v. MacLay*, 18 R. 130.

And this even though the utterance was oral and not in writ.

*Mackay v. M'Cankie*, 10 R. 587.

In view of this state of the law decisions in England as to what amounts to publication need hardly be considered; because if it is publication to utter merely to the person defamed himself, it naturally follows that it is publication to utter defamatory matter to any one else. But it may be useful to note that in that country the following acts have been treated as publication, viz.—the handing over of the libellous document to a type-writer to copy before it is sent to the person defamed,

*Pullman v. Hill*, L.R. 1891, 1 Q.B. 524,

the writing of a libel on a post-card destined for the person defamed,

*Robinson v. Jones*, 4 L.R. Ir. 391,

the sending of a libellous telegram,

*Williamson v. Freer*, L.R. 9 C.P. 393.

In England it has been held that the uttering of a libel about a third person by one spouse to the other is not publication, because husband and wife are one in law. *p. Huddleson, B.*, at p. 537 in

In England utterance by one spouse to another is not publication.

*Wennhak v. Morgan*, L.R. 20 Q.B. D. 635,

but it is at least doubtful if this would be so held in Scotland.

“Not being a voluntary communication, but in answer to a question, makes no difference on the question of publication, whatever it may do on the amount of damages.” *p. L. C. C. Adam.*

Defamatory matter held published though uttered in answer to question.

*Gibson v. Marr*, 3 Mur. 258.

Nor is the libel the less published because it was promulgated by another in breach of confidence to its author.

Or by breach of confidence.

*M'Candie v. M'Candie*, 4 Mur. 197.

But not if  
uttered in  
delirium.

But it would seem that the libel will not be held to be published, or rather its publication will not infer damages, if uttered in delirium.

*Smith v. Maxwell*, Borth. 460.

Media of  
publication.

The *media* for the publication of libels are most varied. Thus they may be contained in letters,

*Stuart v. Moss*, 13 R. 299,

or criticisms,

*Dilke v. Johnstone*, 2 R. 836,

or newspapers,

*Wright v. Outram*, 16 R. 1004,

and even in the placard of a newspaper,

*Archer v. Ritchie*, 18 R. 719,

or in the headline of one of its paragraphs,

*Gudgeon v. Outram*, 16 R. 183.

Through a secretary,

*Rogers v. Dick*, 1 M. 411.

From the pulpit,

*Scotland v. Thompson*, M. App. Delinq. 3.

*Adam v. Allan*, 3 D. 1058.

*Dunbar v. Stoddart*, 11 D. 587.

*Sturrock v. Greig*, 11 D. 1220.

*Edwards v. Begbie*, 12 D. 1134.

In Judicial proceedings,

*Swinton v. Taylor*, 1 S. 59, 2 S. Apps. 245.

*Cullen v. Ewing*, 10 S. 497; 6 W. & S. 566.

*Hustler v. Allan*, 3 D. 366.

*M'Intosh v. Flowerdew*, 13 D. 726.

*Williamson v. Umphray*, 17 R. 905.

*Selbie v. Saint*, 18 R. 88.

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In precognitions sent to the Lord Advocate,

*Harper v. Robinsons*, 2 Mur. 383.

By instructing Counsel to make a defamatory statement,

*Bayne v. Macgregor*, 24 D. 1126.

In a notarial protest,

*Hendersons v. Henderson*, 17 D. 348.

## CHAPTER VI

### CLASSIFICATION OF DEFAMATORY IMPUTATIONS

Defamatory imputations grouped under five heads.

Defamatory  
imputations  
grouped under  
five heads.

DEFAMATORY imputations may be grouped into five classes :—

- I. Those against the moral character.
- II. Those injurious to a person in his trade, business, occupation, profession, or office, including those reflecting on a person's financial condition.
- III. Those against a person's public character.
- IV. Those attributing insanity or obnoxious physical defects to persons.
- V. Verbal injuries. This class really includes many imputations which have been attributed to some of the others, more particularly to 2, 3, and 4.

## CHAPTER VII

### IMPUTATIONS AGAINST A PERSON'S MORAL CHARACTER

Imputations against a person's moral character are defamatory—Imputations of this sort divisible into three species :—(a) Imputations of immorality punishable by law—Examples : (b) Imputations of immorality not necessarily punishable by law—Examples : (c) Imputations of general misbehaviour and of social offences—Tendency of Scots law to allow action for such imputations—Probable reason—Examples.

I. ANY imputation against a man's moral character is defamatory, see L. J. C. Inglis.

*Brownlie v. Thomson*, 21 D. 480.

An imputation of this sort may be one which makes a charge,

- (a) not only of what is immoral, but also punishable by law ;
- (b) of specific immorality, not necessarily punishable by law ;
- (c) of general misbehaviour, or of what is not in the narrower sense of the word immoral, but is a "social offence" or "contrary to the generally accepted standard of honour and propriety amongst gentlemen." See L. M'Laren in

*Milne v. Smith*, 20 R. 95.

*Macfarlane v. Black*, 14 R. 870.

#### (a) CHARGES OF IMMORALITY PUNISHABLE BY LAW.

Abduction, charging a person with, would appear only to be defamatory when referring to the abduction of a girl, if

Imputations against a person's moral character are defamatory. Imputations of this sort divisible into three species.

(a) Imputations of immorality punishable by law. Examples.

the girl is either in pupillarity or under eighteen, and is abducted for immoral purposes.

*Abinet v. Fleck*, 2 S.L.T. 30.

Abortion, procuring,

*Stephen v. Paterson*, 3 M. 571.

Adulterating food,

*Broomfield v. Greig*, 6 M. 563.

Appropriation, dishonest, of other people's goods,

*Black v. Brown*, 5 S. 508.

*Inglis v. Inglis*, 4 M. 491.

Assault,

*Ogilvy v. Paul*, 11 M. 776.

*Ramsay v. MacLay & Co.*, 18 R. 130.

Bankruptcy, fraudulent,

*Stein v. Marshall*, 13 F.C. 309, M. App. Proof 1.

*Mathers v. Lawrie*, 12 D. 433.

*Scott v. Johnston*, 12 R. 1022.

Bloodshed, to say that a man incited to,

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

Botany Bay, saying a person had very great claims to become a member of the society of,

*Macdonald v. Macdonald*, 17 F.C. 327.

Breach of Trust,

*Scotlands v. Thomson*, M. App. Delinquency 3.

*Thompson v. Gillie*, 15 F.C. 636.

*Dallas v. Little Gilmour*, Hume 632.

*Brims v. Reid*, 12 R. 1016.

*Bertram v. Pace*, 12 R. 798.

*Falconer v. Docherty*, 20 R. 765.

*Mitchell v. Grierson*, 21 R. 367.

Bribes, giving and accepting,

*Scotlands v. Thomson*, M. App. Delinq. 3.

*Hamilton v. Rutherford*, M. 13924.

*Ross v. Munro*, Hume 621.



## Bribes—continued.

*Burnaby v. Robertson*, 10 D. 855.

*Torrance v. Weddel*, 7 M. 243.

*Cunningham v. Duncan*, 16 R. 383.

## Brothel, to say a person keeps a,

*Brydone v. Brechin*, 8 R. 697.

*Fraser v. Wilson*, 13 D. 289.

*Mason v. Tait*, 13 D. 1347.

*Fife*, 5 B.S. 574.

## Cheating (see also Fraud and Swindling),

*Grant v. Ramsay*, Hume 611.

*Landles v. Gray*, 1 Mur. 79.

*Paterson v. Shaw*, 8 S. 573.

*Smith v. Gentle*, 6 D. 565.

*Drew v. Mackenzie*, 24 D. 649.

## Collusive agreement, charging a man with making, to defraud,

*Aitken v. Reid*, 2 Mur. 148.

## Conspiracy, charging a man with,

*Nelson v. Black*, 4 M. 328.

## Convicted, criminally, saying a man had been,

*Mackellar v. D. of Sutherland*, 21 D. 222.

*Brown v. M<sup>r</sup>Farlane*, 16 R. 368.

## Crime, saying a man has threatened to commit or has committed a,

*Hill v. Sim*, M. 13921.

*M<sup>r</sup>Ewan v. Magistrates of Edinburgh*, M. 3434.

*Macdonald v. Macdonald*, 17 F.C. 327.

*Ogilvie v. Scott*, 14 S. 729.

## Debauching a patient, to charge a doctor with,

*Marshall v. Renwick*, 13 S. 1127.

## Defrauding the poor,

*Walker v. Robertson*, 2 Mur. 508.

## Dishonesty in general (see also Fraud),

*Barber v. M<sup>r</sup>Vey*, Hume 597.

Dishonesty in general—*continued.*

*Martin v. Murray*, Hume 619.

*Grieve v. Smith*, Hume 637.

*Rae v. M'Lay*, 14 D. 988.

*Dun v. Bain*, 4 R. 317.

*Coghill v. Docherty*, 19 S.L.R. 96.

*Waddell v. Roxburgh*, 31 S.L.R. 721.

Embezzlement,

*Martin v. Ritchie*, 1 S.L.T. 499.

*Hallam v. Gye*, 14 S. 199.

*Mackie v. Lawson*, 13 D. 725.

Extortion,

*Scott v. M'Gavin*, 2 Mur. 484.

*Rodgers v. M'Ewan*, 10 D. 882.

Fabricating bonds,

*Young v. Anderson*, Hume 601.

Falsifying a roup roll,

*Keddie v. Walker*, 3 Mur. 38.

Fire-raising,

*Watsons v. Smeaton*, Hume 624.

*Gudgeon v. Outram*, 16 R. 183.

Forgery,

*Dundas v. Arbuthnot*, M. 13922.

*Gibsons v. Marr*, 3 Mur. 258.

*Smith v. Maxwell*, Borth. 460.

*Holehouse v. Walker*, 15 D. 665.

*Lightbody v. Gordon*, 9 R. 934.

*Mackay v. M'Cankie*, 10 R. 537.

*Ingram v. Russell*, 20 R. 771.

Fraud in general—

Selling light weight and using false measures,

*Robertson v. Falconer*, Hume 603.

*Ross v. M'Kittrick*, 14 R. 255.

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Fraud in general—*continued*.

Saying a warrant had been issued so as to suggest that a person had been guilty of fraud,

*Lawrie v. Campbell*, Hume 606.

Selling articles inferior to what they are represented,

*Thom v. Cameron*, Hume 646.

Altering the text of a letter,

*Yeats v. Ramsay*, 4 S. 275.

Entering into fraudulent transaction to defeat landlord's hypothec,

*Cullen v. Ewing*, 10 S. 497 ; 6 W. & S. 566.

*Selbie v. Saint*, 18 R. 88.

Selling goods and not accounting for the price.

*Taylor v. Anderson*, 6 D. 1026.

Trumping up false claims and fraudulently instigating actions founded on them,

*M'Intosh v. Flowerdeu*, 13 D. 726.

Founding a case on forged documents,

*Logan v. Weir*, 10 S.L.R. 22.

Obtaining money on false pretences,

*Ross v. Ronald*, 12 S. 936.

*Cameron v. Hamilton*, 18 D. 423.

*Hassan v. Paterson*, 12 R. 1164.

*Macleod v. Marshall*, 18 R. 811.

Failure to account for money,

*Ramsay v. MacLay*, 18 R. 130.

Departure without paying rent or debts,

*Brown v. Jamieson*, Hume 640.

*Godfrey v. Thomsons*, 17 R. 1108.

Selling employer's game for own profit,

*Bertram v. Pace*, 12 R. 798.

General accusation of fraud,

*Marianski v. Henderson*, 3 D. 1036.

Gallows, to say a man is worthy of the,

*Ogilvie v. Scott*, 14 S. 729.

Housebreaking,

*Faulks v. Park*, 17 D. 247.

Importuning,

*Young v. Magistrates of Glasgow*, 18 R. 825.

Imposition,

*Fenton v. Currie*, 5 D. 705.

*Davis v. Miller*, 17 D. 1050, 1166.

*Hendersons v. Henderson*, 17 D. 348.

*Gordon v. British & Foreign Metaline Co.*, 14  
R. 75.

Murder, committing or threatening to commit,

*Rose v. Junor*, 9 D. 12.

*Harkness v. M'Kenzie*, Borth. 343.

*Brownlie v. Thomson*, 21 D. 480.

*Paul v. Jackson*, 11 R. 460.

Offence, committing an offence against the game laws,

*Adie v. Gowans*, 9 D. 495.

Overreaching, to charge a person with,

*Ramsay v. Nairne*, 11 S. 1033.

*Smith v. Gentle*, 6 D. 565.

Perjury,

*MacQueens v. Grant*, M. 13939.

*Aitken v. Dudgeon*, 3 Mur. 227

*Gray v. Walker*, 15 S. 1296.

*Lidderdale v. Dobie*, 3 Pats. Apps. 555.

Poaching,

*Brownlie v. Thomson*, 21 D. 480.

Poisoning,

*Reid v. Coyle*, 19 R. 775.

Police, charge of being in hands of,

*Lockhart v. Cumming*, 14 D. 452.

*Scouller v. Gunn*, 14 D. 920.

Post-office offence,

*Warrand v. Falconer*, M. 13933.

Procurator-Fiscal, threatening to report to,

*Cameron v. Stewart*, Hume 630.

*Mackay v. M'Cankie*, 10 R. 537.

*Wilson v. Purvis*, 18 R. 72.

*Ramsay v. MacLay*, 18 R. 130.

Railway offence,

*Buchan v. N. B. Railway Co.*, 21 R. 379.

Rape,

*Finlay v. Ruddiman*, M. 3436.

Resetting,

*Harper v. Robinson*, 2 Mur. 383.

*Scouller v. Gunn*, 14 D. 920.

*Wallace v. Mooney*, 12 R. 710.

Riot, to say that a man incited to riot,

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

Sedition,

*Lowe v. Taylor*, 7 D. 117.

Shebeening,

*Cook v. Gray*, 29 S.L.R. 247.

Sheep-stealing,

*M'Donald v. Fergusson*, 15 D. 545.

Smuggling,

*Thompson v. Gillie*, 15 F.C. 636.

Sodomy,

*Richardson v. Walker*, Hume 623.

Starving children, or the poor,

*Croucher v. Inglis*, 16 R. 774.

*Beattie v. Mather*, 22 D. 952.

Subornation of perjury,

*Crichton v. Forrest*, Hume 635.

*Craig v. Marjoribanks*, 3 Mur. 341.

*Gilchrist v. Dempster*, 3 Mur. 363.

Swindling, general charges of,

*M'Guffie v. M'Donnell*, Hume 638.

*Fleshers of Dumfries v. Rankine*, 19 F.C. 224.

*Callender v. Milligan*, 11 D. 1174.

*Drew v. Mackenzie*, 24 D. 649.

*Macrae v. Sutherland*, 16 R. 476.

*Stewart v. Sproat*, Poor Law Mag. 1858.

Theft. Accusing a person of having committed theft or of being a thief, is one of the most common imputations on the character, and it is unnecessary to give here a complete list of the cases. Reference is made to the dictionary, where all the cases are quoted.

Thimblerigging,

*Drew v. Mackenzie*, 24 D. 649.

Transportation, saying a man deserves,

*Marianski v. Henderson*, 3 D. 1036.

(b) Imputations of specific immorality not necessarily punishable by law.  
Examples.

(b) CHARGES OF SPECIFIC IMMORALITY NOT NECESSARILY  
PUNISHABLE BY LAW.

Adultery (*see* Indecency).

Deceit and untruthfulness,

Saying that a man cheated or is a cheat,

*M'Vean & Co. v. Blair*, Hume 609.

*Smith v. Gentle*, 6 D. 565.

*M'Larty v. Steele*, 8 R. 435.

Deceit in general,

*Cooper v. Greig*, Hume 648.

*M'Neill v. Rorison*, 10 D. 15.

Defrauding the poor,

*Walker v. Robertson*, 2 Mur. 508.

"Done," saying a person had, another,

*M'Larty v. Steele*, 8 R. 435.

Deceit and untruthfulness—*continued*.

- Falsehoods, saying a person had uttered,  
*Scotlands v. Thomson*, M. App. Delinq. 3.  
*Christie v. Houy*, 3 S. 14.  
*Hamilton v. Duncan*, 4 S. 414.  
*Dudgeon v. Forbes*, 11 S. 1014.  
*M'Neill v. Rorison*, 10 D. 15.

- False reports and statements, charge of making,  
*Kennedy v. Baillie*, 18 D. 138.  
*Innes v. Adamson*, 17 R. 11.

- False balance-sheets, charge of making,  
*Martin v. Ritchie*, 1 S.L.T. 499.

- False representations and imposition,  
*Hustler v. Allan*, 3 D. 366.  
*Fenton v. Currie*, 5 D. 705.

- "Liar," saying a man is, or lies,  
*Forbes v. Young*, Hume 627.  
*Hyslop v. Staig*, 1 Mur. 15.  
*Scott v. Scougall*, 2 Mur. 505.  
*Hamilton v. Hope*, 4 Mur. 222, 5 S. 569.  
*Dawson v. Boyd*, 12 S. 573.  
*Scott v. Docherty*, 6 D. 5.  
*Bryson v. Inglis*, 6 D. 363.  
*Campbell v. Menzies*, 17 D. 1132.  
*M'Laren v. Robertson*, 21 D. 183.  
*Coghill v. Docherty*, 19 S.L.R. 96.  
*Macleod v. Marshall*, 18 R. 811.  
*Milne v. Walker*, 21 R. 155.

- Misrepresentation as to his means, saying a man has made,

*Milne v. Bauchope*, 5 M. 1114.

- Misstatements, saying a man has made culpable and wilful,

*Gray v. Walker*, 15 S. 1296.

Deceit and untruthfulness—*continued*.

Obtaining money not due, charging a man with,  
*Cameron v. Hamilton*, 18 D. 423.

Overreaching, charging a man with,  
*Smith v. Gentle*, 6 D. 565.  
*Ramsay v. Nairne*, 11 S. 1033.

Pretences,

Pretending to be some one else than one is, and  
 thus deceiving public,  
*Johnstone v. Dilke*, 2 R. 836.

Pretending to be able to do what one cannot,  
*Stuart v. Moss*, 13 R. 299.

Pretending to be manufacturer of another's  
 patent,  
*Gordon v. British & Foreign Metaline Co.*,  
 14 R. 75.

Pretending that outrages had been committed  
 on one,  
*Browne v. M'Farlane*, 16 R. 368.

Swindling, saying a person makes a livelihood by,  
*Bryson v. Inglis*, 6 D. 363.

Thimblerigging, saying a person is guilty of,  
*Drew v. Mackenzie*, 24 D. 649.

Truth, saying a person is void of,  
*Grieve v. Smith*, Hume 637.

Indecency, improper intercourse, and improper conduct.

Adultery,

*Graeme v. Cunningham*, M. 13923.  
*Douglas v. Chalmers*, 3 Pats. App. 26.  
*Lovi v. Wood*, Hume 613.  
*M'Vane v. M'Alpine*, Hume 625.  
*M'Kennal v. Wilson*, Hume 628.  
*Ramsay v. Nairne*, 11 S. 1033.  
*Dunbar v. Stoddart*, 11 D. 587.



Indecency and improper intercourse—Adultery—*continued.*

*Innes v. Swanson*, 20 D. 250.

*Rankin v. Simpson*, 21 D. 1057.

Carnal connection and fornication,

*Alexander v. Macleod & Co.*, 2 S.L.T. 123.

*Durham v. Mair*, Hume 599.

*Cullen v. Ewing*, 10 S. 497; 6 W. & S. 566.

*M'Culloch v. Litt*, 13 D. 334.

*A. B. v. C. D.*, 14 D. 177.

*Gibb v. Barron*, 21 D. 1099.

*Watson v. Burnet*, 24 D. 494.

*M'Donald v. M'Donald*, Borth. 388.

Illegitimate child, charging a man with being the father of a,

*Stephen v. Paterson*, 3 M. 571.

Immodest and indecent behaviour,

*M'Neill v. Rorison*, 10 D. 15.

*Jack v. Fleming*, 19 R. 1.

Immorality, general accusation of,

*Robertson v. Preston*, M. 7465 & 7468.

Lewdness,

*Gibb v. Barron*, 21 D. 1099.

Light behaviour,

*M'Kennal v. Wilson*, Hume 628.

*M'Culloch v. Litt*, 13 D. 334.

Obscene anonymous letters, to accuse a person of having written,

*Kingan v. Watson*, 4 Mur. 485.

Seduce girls, saying a man seeks to,

*Milne v. Smiths*, 20 R. 95.

Street-walker,

*M'Neill v. Forbes*, 10 R. 867.

Trull, to call a woman a,

*Scorgie v. Hunter*, 9 S.L.R. 292.

Indecency and improper intercourse—Adultery—*continued*.

Whore, to call a woman a,

*Ross v. M'Kerrel*; Hume 601.

*Purdon v. Buchanan*, Hume 608.

*Allan v. Douglas*, Hume 639.

Whoremonger, accusing a person of being,

*Martin v. M'Lean*, 6 D. 981.

A curious case must be noticed, where the question was considered, but not decided, whether a person could sue because the defender had said that the pursuer's mother kept a brothel.

*Symmond v. Williamson*, M. 3435.

It must be noticed that in Scotland a woman has always been entitled to sue for an imputation on her virtue. In this respect the Scots differed from the English Law, which did not, until the passing of the recent Slander of Women Act, 54 & 55 Vict. c. 51, allow a woman action for such imputation without proof of special damage.

(c) Imputations  
of general mis-  
behaviour and  
of social  
offences.

#### (c) CHARGES OF GENERAL MISBEHAVIOUR AND OF SOCIAL OFFENCES.

Tendency of  
the Scots law  
to allow action  
for such im-  
putations.

There is no doubt that many defamatory imputations may be made about persons which do not amount either to accusations of crime or of non-criminal immorality, but which will tend in a greater or less degree to injure their reputations, and lower them in the esteem of others. Charges of ordinary misbehaviour and of the committal of social offences are in this category. The tendency of the Scottish law has been distinctly to allow persons complaining of such imputations to sue in respect of them. In fact, our law is painfully sensitive of people's reputation, and has gone to lengths in vindicating it which can hardly be justified. There is reason in allowing a person action when he has been falsely accused of some crime or glaring im-

morality, or when his conduct is precisely criticised in such a way that he cannot fail to suffer in repute. But it is against liberty of speech and opinion, and also against common sense, to allow a person action for every characterisation of his conduct which either he himself thinks unpleasant or which might possibly lower him in the eyes of a greater or less number of individuals. The proneness of the Scots law to allow action for merely general charges of misbehaviour is probably due to its granting *solatium* for the injured feelings of persons, without proof of either actual or possible damage. Though possibly many would object to this feature of our law being obliterated (though no great harm would be done if it were), it is obvious that it should be very clearly defined. *Solatium* cannot be allowed to a person for anything which he says has hurt his feelings, nor should damages be awarded for any statement about him which he can prove is, in the opinion of a larger or smaller number of people, objectionable. In allowing a person action when he has been falsely accused of crime, the law is on safe ground, for what is criminal is ascertainable, and if the accusation amounts to a charge of what is criminal the right of action is clear. The same is true when the charge is merely one of non-criminal immorality, for there is a pretty general consensus as to what is immoral though not criminal. But when a person complains that another has made some imputation, not of crime or of immorality, but more or less offensive in the complainer's opinion, and the law allows him an action therefor, all rule is departed from, and law ceases to be the master, and becomes the tool of the individual. There is a large number of descriptive adjectives applied to the conduct, and having no precise or well-defined meaning. Such words as "bad," "disgraceful," "dishonourable," "improper," and many others, really convey no definite charge. What one calls "bad" another will think in no way

Probable  
reason.

reprehensible. Some people whose consciences are more strict, or whose hypocrisy is greater, will use these words where ordinary mankind would never think of applying them. Many persons whose feelings are more sensitive, or whose appetite for damages is great, will raise actions for the use of such words where ordinary humanity would disregard them. In nine cases out of ten, when such actions are raised no actual pecuniary damage is proved or is provable. As matter of fact in England many of these words when uttered as slander are not actionable without proof of special damage. Thus the words "cheat" and "swindler" do not ground an action.

*Savile v. Jardine*, 2 H.Bl. 531, 3 R.R. 502.

In these circumstances the following list of imputations of this general character must be read in connection with what has been said. It may be sincerely hoped that the Courts will reconsider some of the judgments noted below, and refuse in future to allow action on many of the words.

**Examples.**

"Abominable," applied to a woman in connection with suggestions against her virtue, appears actionable, but it is doubtful whether it is so as a mere criticism of conduct and standing alone,

*McCulloch v. Litt*, 13 D. 334.

Altering the text of a letter, to charge a man with,

*Yeats v. Ramsay*, 4 S. 275.

Anonymous letters, to say a man wrote, thereby indicating that he had been guilty of treacherous and dishonourable conduct,

*Menzies v. Goodlet*, 13 S. 1136.

Appearances, false, to say of a man that he makes, and on false credit engages in speculation and improvements and indulges in sumptuous living,

*Smith v. Gentle*, 6 D. 565.

Associate of a person long placed beyond the pale of professional respect and courtesy, to say of a man that he is the,

*Muller v. Robertson*, 15 D. 170, 661.

It is, however, difficult to see why such a charge in itself should ground an action. The charge amounts to nothing more than that a person keeps company with an objectionable individual.

Author of a libel, to say a man is the,

*Jardine v. Creech*, M. 3438.

*Home v. Lundie*, 10 S. 508.

[But the pursuer must set forth exactly what libel he is said to have uttered.]

*Milne v. Smiths*, 20 R. 95.

Bad man, and a detestable member of society, to say a person is a,

*Anderson v. Richardson*, M. 3438.

Bad lot, to say a person is a,

*Green v. Chalmers*, 6 R. 318.

The two preceding cases are very questionable.

The accusations are so vague that no one could understand them as being more than the personal opinion of the utterer.

Base and unfair means, to say that, were resorted to at an election, and that pursuer intimidated voters,

*Fair v. Barclay*, 12 S. 565.

Betrayal of confidence and breach of trust, to charge a man with,

*Richards v. Chisholm*, 22 D. 215.

*Mitchell v. Grierson*, 21 R. 367.

Blackguard, to call a man a, is defamatory without an innuendo,

*Brownlie v. Thomson*, 21 D. 480.

*Young v. Inglis*, Hume 608.

*Shearlock v. Beardsworth*, 1 Mur. 196.

Blackguard, to call a man a, is defamatory without an innuendo—*continued*.

*Thom v. Graham*, 13 S. 1129.

*Taylor v. Anderson*, 6 D. 1026.

*Rose v. Junor*, 9 D. 12.

*Macleod v. Marshall*, 18 R. 811.

*Milne v. Smiths*, 20 R. 95.

Blackmail, to say a person is trying to,

*Rhind v. Kemp*, 1 S.L.T. 290, 367.

Blasphemy, to charge a person with,

*Dunbar v. Stoddart*, 11 D. 587.

*Macfarlane v. Black*, 14 R. 870.

Brute, or brutal character, to say a man is a disgusting,

*Ogilvie v. Scott*, 14 S. 729.

*Croucher v. Inglis*, 16 R. 774.

Calumniator, to call a man a,

*Russell v. Shirreffs*, 15 S. 881.

Character, adjectives applied to, which are held to be defamatory :

“Bad,”

*Lockhart v. Cumming*, 14 D. 452.

*Brownlie v. Thomson*, 21 D. 480.

“Brutal,”

*Croucher v. Inglis*, 16 R. 774.

“Contemptible” and “discreditable,”

*Lowe v. Tayler & Others*, 7 D. 117.

“Despised,”

*Denham v. Ogilvie*, 4 Mur. 195.

“Improper,” applied to a woman,

*M'Culloch v. Litt*, 13 D. 334.

“Questionable,”

*Macleod v. Marshall*, 18 R. 811.

“Worst,” to say a person is one of the,

*M'Donald v. Begg*, 24 D. 685.

Character, adjectives applied to, which are held to be defamatory—*continued*.

“Worthless,”

*Croucher v. Inglis*, 16 R. 774.

Charges, accusation of making unauthorised, in accounts,

*Martin v. Ritchie*, 1 S.L.T. 499.

Conduct, adjectives applied to, which are held to be defamatory:

“Bad,”

*Torrance v. Leaf*, 13 S. 72.

“Contemptible,”

*Waddell v. Roxburgh*, 31 S.L.R. 721.

“Discreditable,” “disgraceful,” “dishonest,”

“despicable,”

*Mackellar v. D. of Sutherland*, 21 D. 222.

But it is doubtful whether “despicable” is actionable when used alone, and in all probability “discreditable” and “disgraceful” may only be held so in view of the circumstances.

*Rae v. M'Lay*, 14 D. 988.

“Dishonourable” may or may not be libellous.

It is so when directly applied as a criticism of a man's conduct,

*Blasquez v. Lothians Racing Club*, 16 R. 893.

*Macrae v. Sutherland*, 16 R. 476.

*Bruce v. Leisk*, 19 R. 482.

*Menzies v. Goodlet*, 13 S. 1136.

*Donaldson v. L. Perth*, 4 Pats. Apps. 112.

But it is not libellous when used as mere comment on a particular action,

*Turnbull v. Oliver*, 19 R. 154.

*Archer v. Ritchie*, 18 R. 719.

“Incompatible” with belief in Christianity, said of a missionary,

*Davis v. Miller*, 17 D. 1050, 1166.

Conduct, adjectives applied to, which are held to be defamatory—*continued*.

"Indecorous" applied to a missionary is actionable, but it is doubtful whether when applied to people in general it is so,

*Davis v. Miller*, 17 D. 1050, 1166.

"Low" is not apparently actionable in itself and used alone.

"Mean" is probably not actionable by itself,

*Rae v. M'Lay*, 14 D. 988.

*Fraser v. Morris*, 15 R. 454.

But may be innuendoed along with other words,

*Waddell v. Roxburgh*, 31 S.L.R. 721.

"Unfair" may also have an innuendo put on it,

*Waddell v. Roxburgh*, 31 S.L.R. 721.

"Unseemly," "unbecoming," when applied to a minister or schoolmaster, are actionable,

*Davis v. Miller*, 17 D. 1050, 1166.

*Sturrock v. Greig*, 11 D. 1220.

But probably are not so when applied as criticism to people in general.

"Singular" probably is not actionable when used to characterise a man's conduct, unless further statements made give it a distinctly defamatory meaning,

*Gudgeon v. Outram*, 16 R. 183.

"Treacherous,"

*Menzies v. Goodlet*, 13 S. 1136.

Most of these adjectives applied to character and conduct are very vague in their meaning. The law in allowing action for the use of them is merely providing an arena for the combats of personal animosities.



Corruption, to accuse a man of,

*Mitchell v. Grierson*, 21 R. 367.

Coward, to accuse a man of being a,

*Hyslop v. Staig*, 1 Mur. 15.

*Shearlock v. Beardsworth*, 1 Mur. 196.

*Armstrong v. Vair*, 3 Mur. 315.

*Menzies v. Goodlet*, 13 S. 1136.

*Russell v. Shirreffs*, 15 S. 881.

Crimes, to say a man has committed diabolical (without specification), is not actionable,

*Stephen v. Paterson*, 3 M. 571.

“Debauched,” to say a man is,

*Stewart v. Swinton*, 4 S. (N.E.) 35.

Desecration, and desecrating the Sabbath, to charge a man with,

*Maclean v. Fraser*, 3 Mur. 353.

*Grant v. Coltart*, 12 S. 385.

*Lowe v. Taylor*, 7 D. 117.

*Macfarlane v. Black*, 14 R. 870.

Designing person, to say a person is a,

*Henderson v. Henderson*, 17 D. 348.

“Disgrace,” to say a person is a,

*Newlands v. Shaw*, 12 S. 550,

or that he disgraces his office,

*Coghill v. Docherty*, 19 S.L.R. 96.

These three last cases all seem to give encouragement to the raising of actions for vague and unreal injury.

Disloyalty, to charge a person with,

*Hamilton v. Stevenson*, 3 Mur. 75.

*Lowe v. Taylor*, 7 D. 117.

Disobedience to the laws or those in lawful authority, to charge a person with,

*Skinner v. Dunbar*, 11 D. 945.

*Lowe v. Taylor*, 7 D. 117.

Dog, to call a man a. It is very doubtful whether this will now be held defamatory. See "Puppy."

*Forbes v. Young*, Hume 627.

Dogmatist, to call a man an insolent,

*Leslie v. Blackwood*, 3 Mur. 157.

This charge was mingled with many others in the issue, but it is difficult to understand how such a charge could be treated as defamatory. It is merely a personal expression of opinion, and its meaning is absolutely vague.

Drunkenness. See Insobriety.

Encroach, to say a man has encroached on his neighbour's property,

*Gilchrist v. Dempster*, 3 Mur. 363.

This is another case where action was allowed for a statement which no sensible person would treat seriously.

Fanatic, question how far defamatory to represent a man as a. *p. L. O. Kyllachy*.

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

Gentleman, to say a person is destitute of the feelings of a,

*Mackay v. Campbell*, 11 S. 1031.

Gluttony, to accuse a person of,

*Sheriff v. Wilson*, 17 D. 528.

Hypocrite, to call a person a,

*Brown v. Jamieson*, Hume 640.

Ignorance of religion, to accuse a person of,

*Dudgeon v. Forbes*, 11 S. 1014.

Imposition, to charge a man with,

*Fenton v. Currie*, 5 D. 705.

Improper character, to say a woman is an,

*McCulloch v. Litt*, 13 D. 334.

Infidel, to say a person is an,

*Adam v. Allan*, 3 D. 1058.

Inciting to violence, to charge a person with,

*Lowe v. Taylor*, 7 D. 117.

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

Informer, to say that a man is a common,

*Kennedy v. Allan*, 10 D. 1293.

*Graham v. Roy*, 13 D. 634.

Insobriety, to charge a person with. The number of cases where an imputation of being drunken has been held defamatory is large, and a list of them will be found in the dictionary under the word "Drunkenness."

"Irksome," to say a person's presence is, may be innuendoed into a defamatory meaning,

*Macleod v. Marshall*, 18 R. 811.

Irreligious, to say a man is,

*Grieve v. Smith*, Hume 637.

*Walker v. Robertson*, 2 Mur. 508.

Judas, to call a person,

*Cunningham v. Duncan*, 16 R. 383.

Libel, to say a man has uttered a,

*Grant v. McCowan*, 1 S.L.T. 73.

See also, Author of a Libel.

Malfeasance, to charge a person with,

*Herdman v. Young*, M. 13987.

Malicious acts, to charge a person with,

Gagging the safety-valve of an engine,

*White v. Clough*, 10 D. 332.

Throwing down the walls of a burying-ground,

*Rogers v. Dick*, 1 M. 411.

Threatening to murder or commit crime,

*Hill v. Sim*, M. 13921.

*Paul v. Jackson*, 11 R. 460.

Wilfully allowing a mill to be burned down,

Malicious acts, to charge a person with—*continued*.

*Gudgeon v. Outram*, 16 R. 183.

To say that a person has maliciously endeavoured to discredit other people,

*Neilson v. Johnston*, 17 R. 442.

Mean origin, to say a person is of,

*Porteous v. Izat*, M. 13937.

Mob, to say a person formed one of a, or incited a, to turbulence,

*M'Douall v. Guthrie*, 15 D. 778.

*Lowe v. Taylor*, 7 D. 117.

Obscene letters, to charge a person with writing,

*Kingan v. Watson*, 4 Mur. 485.

Oppression in office, to charge a person with,

*Herdman v. Young*, M. 13987.

Overcharging for inferior articles, to accuse a person of,

*Macrae v. Wicks*, 13 R. 732.

Overreaching, to accuse a person of, another,

*Smith v. Gentle*, 6 D. 565.

*Ramsay v. Nairne*, 11 S. 1033.

Perverter of youth, to say a man is a,

*Leslie v. Blackwood*, 3 Mur. 157.

Plagiarist, to call a man a,

*Leslie v. Blackwood*, 3 Mur. 157.

Principle, want of, to charge a man with,

*Stephen v. Paterson*, 3 M. 571.

Profane language, charge of using,

*Grant v. M'Cowan*, 1 S.L.T. 73.

Puppy, to call a man a, is not libellous,

*Jameson v. Bonthrone*, 11 M. 703.

But see

*Hyslop v. Staig*, 1 M. 15.

Questionable, to say a man's character is,

*Macleod v. Marshall*, 18 R. 811.

Rascal, to call a man a,

*Harkes v. Mowat*, 24 D. 701.

Reprobate life, to say a man leads a,

*Grieve v. Smith*, Hume 637.

Rogue, mansworn, to call a man a,

*Lowthers v. Rae*, Hume, 592.

Such words as "rascal," "reprobate," "rogue," and "scoundrel" are exceedingly vague, and it is much to be regretted that action should be allowed on words which may have any or no meaning.

Sacrilege, to accuse a man of,

*Gardner v. Mackenzie*, 8 D. 859.

Satanic agent, to call a man a,

*Adam v. Allan*, 3 D. 1058.

Scamp, to call a man a,

*Miller v. Mackay*, 16 F.C. 360.

*Milne v. Smiths*, 20 R. 95.

But if merely applied by way of abuse, it does not found an action for defamation,

*Mackintosh v. Squair*, 40 Scot. Jur. 561.

Scoffer at religion, to call a man a,

*Macfarlane v. Black*, 14 R. 870.

Scoundrel, to call a man a,

*Miller v. Mackay*, 16 F.C. 360.

*Allan v. Douglas*, Hume 639.

*M'Pherson v. M'Pherson*, Hume 644.

*Christian v. Kennedy*, 1 Mur. 419.

*White v. Clough*, 10 D. 332.

*Macleod v. Marshall*, 18 R. 811.

Serpent, or snake, to call a man a, may be held defamatory,

*M'Laren v. Ritchie*, Glegg on Reparation 497.

Skedaddled, to say a man has,

*Ingram v. Russell*, 20 R. 771.

Starving people, to charge a person with,

*Croucher v. Inglis*, 16 R. 774.

*Beattie v. Mather*, 22 D. 952.

Treacherous fellow, to call a man a,

*Grierson v. Harvey*, 43 Scot. Jur. 190.

Two-faced man, to call a person a,

*Cunningham v. Duncan*, 16 R. 383.

Villain, to call a man a,

*Oliphant v. M'Nicol*, 5 B.S. 573.

*Adam v. Allan*, 3 D. 1058.

*White v. Clough*, 10 D. 332.

Viper, to call a man a, may be defamatory,

*M'Laren v. Ritchie*, Glegg on Reparation 497.

Want of principle, to accuse a man of,

*Stephen v. Paterson*, 3 M. 571.

Wilfully permitting a mill to be burned down, to charge a  
man with,

*Gudgeon v. Outram*, 16 R. 183.

Worthless, to say a person is,

*Finlay v. Ruddiman*, M. 3436.

*Croucher v. Inglis*, 16 R. 774.

This in itself seems to be far too vague a word on  
which to allow action.

## CHAPTER VIII

### IMPUTATIONS ON A PERSON IN HIS TRADE, BUSINESS, OCCUPATION, PROFESSION, OR OFFICE, INCLUDING THOSE REFLECTING ON HIS FINANCIAL CONDITION.

Imputations defamatory of certain classes may not be so of others—Thus imputations against persons in trade, etc.—Untrue imputations against persons in trade, etc., not always actionable—What are and what are not—Right of free speech justifies criticism—But not the utterance of demonstrably injurious falsehoods—Possible distinction between imputations on persons in professions and tradesmen—Imputations of this class grouped under five heads :—(a) Imputations of unfitness ; (b) Imputations of neglect of duties ; (c) Imputations of improper conduct ; (d) Imputations against a person's business or its productions—Divisible into two sub-heads :—(a) General imputations against business ; (β) Imputations on financial position—Actionable to say a man is bankrupt—But not to say he is poor—Entry of name in black list—(e) General Imputations hurtful to persons in business, etc.—Classes of persons who have complained of imputations injurious to them in their business, etc.

II. It was once said by L. J. C. Inglis that “some epithets may be actionable when applied in particular cases—as to a lady or a clergyman—which would not when applied to other individuals,”

Imputations defamatory of certain classes may not be so of others.

*Brownlie v. Thomson*, 21 D. 480,

and this *dictum* is exemplified by many instances in our law.

Imputations which when made of people in general could do them no possible harm, and could convey no evil reflection on them, may be most injurious if applied to persons of some particular class. Thus it is that imputations which tend to injure persons in their trade, business, occupation, pro-

Thus imputations against persons in their trade, etc.

Untrue imputations about persons in trade, etc., not always actionable. What are and what are not.

fession, or office, will in certain cases found actions for defamation. As in other classes of defamation, the right to recover damages in this depends upon the imputations being untrue. But a statement which tends to injure a person in his trade, etc., though untrue, will not necessarily render the utterer liable in damages. A distinction has to be drawn between positive and precise assertions about a person in his trade, etc., which necessarily tend to injure him in it, and such criticism of him, or what he deals in, as might honestly be concurred in by some though not by others. The former, if untrue, entitle the person complaining of them to damages, the latter will not. The inclination of the Court is to send to a jury the question whether statements of the class under discussion are of the one kind or of the other—whether they are positive, false, and injurious, or whether they are merely critical. But the question is one of great importance, and it seems desirable to define the boundary between what must be considered naturally injurious to a man in his trade, etc., and what is merely permissible criticism.

Right of free speech justifies criticism.

The right of free speech entitles people to express their opinions of their neighbours, and of their qualifications for their respective vocations, the manner in which they ply them, and the quality of what they produce. This right is not lost to a person because his opinion may not be generally shared. He is entitled to hold it and express it fearlessly without liability in damages for doing so. But the right of free speech does not entitle persons to say what is demonstrably untrue of their neighbours, and of their business, or professional affairs, and what would naturally tend to injure them in their affairs. It may therefore be broadly stated that if A makes an untrue and disparaging, and positive statement about the qualifications of B for his (B's) vocation, or about the manner in which B plies it, or the quality of what B produces in his vocation, B will be entitled to damages from A.

But not the utterance of demonstrably injurious falsehoods.



Although no *dicta* can be pointed to exactly supporting the proposition, there seems some reason to believe that a distinction may be drawn between imputations on (1) persons engaged in professions, posts, and occupations which are only open to those who can instruct a qualification to fill them, and those on (2) persons engaged in trades and other pursuits, to follow which no express qualification is needed. It would certainly appear that imputations on the qualifications and work of persons in the first class would be presumed false, and would be therefore treated as properly defamatory. On the other hand, the law has no right to presume that persons in the second class have any qualifications for the business they are engaged in, and consequently persons in that class complaining of imputations on their qualifications and productions would have to prove the imputations false—they being treated practically as verbal injuries in so far as the falsehood of the imputation requires to be proved.

Possible distinction between imputations on persons in professions, etc., and tradesmen.

No more precise rules than those here stated can be laid down to settle when an imputation against a person in his trade, etc., is, and when it is not actionable. It must be noticed, however, that the law protects persons in every legal occupation against defamation affecting them in it, *p. curiam*, p. 330.

Imputations of this class grouped under five heads.

*Foulger v. Newcomb*, L.R. 2 Ex. 327.

But the cases on this branch of the subject can, for the most part, be grouped under one or other of five heads.

(a) Cases where the imputation is that the person is unfit for the post he holds, or the vocation he follows.

(a) Imputations of unfitness.

*M Kerchar v. Cameron*, 19 R. 383.

*Auld v. Shairp*, 2 R. 940.

*Johnstone v. Dilke*, 2 R. 836.

*Ogilvy v. Paul*, 11 M. 776.

*M Bride v. Williams*, 7 M. 427.

*Balfour v. Wallace*, 15 D. 913.

*Sturrock v. Greig*, 11 D. 1220.

*Bryson v. Inglis*, 6 D. 363.

*Alexander v. Macdonald*, 4 Mur. 94.

*Cooper v. Greig*, Hume 648.

(b) Imputa-  
tions of neglect  
of duties.

(b) Cases where the imputation is that a person is neglect-  
ing his duties.

*Hill v. Thomson*, 19 R. 377.

*Lowe v. Taylor*, 7 D. 117.

*Hallam v. Gye*, 14 S. 199.

*Anderson v. Wishart*, 1 Mur. 429.

*Thompson v. Gillie*, 15 F.C. 636.

(c) Imputa-  
tions of im-  
proper conduct.

(c) Cases where the imputation is that a person has acted  
contrary to the manner in which society expects one in his  
position to act. The number of cases of this kind is con-  
siderable, and a few only need be here cited. They will all  
be found cited *infra* in enumerating charges against persons  
in particular positions and posts. An imputation of improper  
business conduct is defamatory.

*British Legal Life Assurance v. Pearl Life  
Assurance*, 14 R. 818.

To charge a sheriff officer with misfeasance.

*Richardson v. Wilson*, 7 R. 237.

To charge a magistrate with disgracing his office or cor-  
ruption.

*Coghill v. Docherty*, 19 S.L.R. 96.

*Mitchell v. Grierson*, 21 R. 367.

To charge a minister with unseemly or disgraceful conduct.

*Mackellar v. Duke of Sutherland*, 21 D. 222.

*Davis v. Miller*, 17 D. 1050, 1166.

To charge a telegraph clerk with divulging messages, or a  
postmaster with opening letters.

*Richards v. Chisholm*, 22 D. 215.

*Warrand v. Falconer*, M. 13933.

To charge a law agent with conducting cases for his own advantage, and regardless of the interests of his client.

*M'Rostie v. Ironside*, 12 D. 74.

To say of an innkeeper that he keeps a disorderly and riotous inn, and has committed a breach of his certificate,

*Keay v. Wilsons*, 5 D. 407.

To say of a medical man that he drugged and debauched a patient,

*Marshall v. Renwicks*, 13 S. 1127.

To say that a trustee is untrustworthy,

*Falconer v. Docherty*, 20 R. 765.

(d) Cases where a statement is made about a person's business, trade, or profession, or the character of its productions, by which it is directly injured. Many of the instances of this class of case are not distinguishable from verbal injury ; but it includes also the important cases of imputations against a person's solvency and financial position. It may therefore be divided into

(d) Imputations against a person's business, or its productions.

Divisible into two sub-heads.

(a) General statements about a person's business, trade, or profession, or the character of its productions, by which it is directly injured.

(a) General imputations against business.

(β) Imputations against a person's solvency or financial position.

(a) It is actionable to say that typhoid fever had been traced to a particular dairy,

*M'Lean v. Adam*, 16 R. 175.

To say that a hotel is characterised by much drinking and dirtiness, or by gambling,

*M'Iver v. M'Neill*, 11 M. 777.

*Carmichael v. Cowan*, 1 M. 204.

To say that members of committee of a bank had helped themselves to its funds, entitles the bank to action, as the statement will be injurious to it,

*North of Scotland Bank v. Duncan*, 19 D. 881.

To say that the company to which a person belongs is bogus,

*Hustler v. Allan*, 3 D. 366.

To say of a minister that no person having grace would listen to his sermons,

*Martin v. M'Lean*, 6 D. 981.

To say that a person sells inferior articles,

*Macrae v. Wicks*, 13 R. 732,

*Hamilton v. Arbuthnot*, M. 13923,

with which, however, compare,

*Broomfield v. Greig*, 6 M. 563,

or to criticise severely and unwarrantably a person's literary work,

*Johnston v. Dilke*, 2 R. 836.

*Hamilton v. Duncan*, 4 S. 414.

*Jardine v. Creech*, M. 3438.

It must be borne in mind, however, that the field of criticism is one in which there is wide scope for divergence of opinion, and that mere severity of criticism is not a good ground for allowing the criticised an action,

*Crotty v. M'Farlane*, Glegg on Reparation 501.

(β) Imputations on financial position. Actionable to say a man is bankrupt.

(β) Imputations against a person's solvency and on his financial condition are defamatory.

It is perfectly clearly recognised that to say a man is a bankrupt is actionable,

*Lowthers v. Rae*, Hume 592.

*M'Vean & Co. v. Blair*, Hume 609.

*Couseland v. Cuthil*, 5 Mur. 148.

*Outram v. Reid*, 14 D. 577.

It is also actionable to say that a man has been bankrupt,

*M'Pherson v. M'Pherson*, Hume 644.

*Mathers v. Lawrie*, 12 D. 433.

*Bruce v. Leisk*, 19 R. 482.

And it is also actionable to say that a man will soon be bankrupt, But not to say he is poor.

*Anderson v. Hunter*, 18 R. 467.

Merely saying that a person is in poor circumstances, and one to whom no credit would be given, appears not to be actionable in itself, though it is capable of innuendo,

*M'Laren v. Robertson*, 21 D. 183.

And the same applies to a statement that a person has never paid a farthing of rent,

*Buchans v. Walch*, 20 D. 222.

But it would appear that a statement that a person is a man of no means is in itself actionable,

*Macrae v. Sutherland*, 16 R. 476.

It has been held libellous to say, "I know his blasted character for dilatory payments,"

*Munro v. Munro*, Hume 616,

and in view of this case and that of *Macrae v. Sutherland* it is probably the law that a statement that a person is in want of money, although not bankrupt, is actionable if untrue and loss can be proved. This view is supported by the case of

*Wright & Greig v. Outram*, 16 R. 1004,

where a newspaper published a report that a man being examined in bankruptcy proceedings had stated that he had "financed" Wright & Greig, and that they were very hard up. This was innuendoed as representing that the pursuers were in "financial difficulties and were being financed." A mere statement that a person is poor would not be either a reflection on his character or injurious, but a suggestion that a person's resources are inadequate to the demands upon them may be both. Thus it is actionable to say that a man purchased goods when he was not only well aware that he was insolvent, but that he never could pay for them,

*Torrance v. Leaf*, 13 S. 72.

Entry of name  
in black list.

The entry of a person's name in a black list, coupled with a note that some of the persons mentioned in it may possibly have credit given them, is actionable,

*Andrews v. Drummond*, 14 R. 568.

But a mere list of persons against whom decrees have been granted or against whom convictions have been obtained is not in itself sufficient to ground a claim of damages.

*Taylor v. Rutherford*, 15 R. 608.

*Buchan v. N. B. Railway Co.*, 21 R. 379.

But the black list must be scrupulously accurate, and thus when decree had only been taken for expenses, and the black list made it appear that the decree was for the principal sum sued for, damages were found due.

*Rarity v. Stubbs & Co.*, 1 S.L.T. 74.

(e) General im-  
putations hurt-  
ful to persons  
in business, etc.

(e) Cases where imputations of a general character have been made against persons in their trades, etc. These are undoubtedly cases where the law has been far too much inclined to allow action as a salve for hurt feelings and regardless of freedom of speech. Thus it is actionable to say of a medical man that he was "placed beyond the pale of professional respect and courtesy." *p. L. J. C.*

*Mullar v. Robertson*, 15 D. 661.

To say of an Episcopalian vestryman that "he is unworthy to take part in the business and councils of God's House,"

*Edwards v. Begbie*, 12 D. 1134.

To say of a law agent that he is utterly destitute of the feelings of a gentleman,

*Mackay v. Campbell*, 11 S. 1031.

Classes of  
persons who  
have com-  
plained of im-  
putations  
injurious to  
them in their  
trade, etc.

The following is an enumeration of the classes of persons who have brought actions for imputations alleged to be injurious to them in their trade, etc., and reported in the Scots books.

Agents (see also Law Agents and Factors),

To charge A. with unfair and fraudulent practices,  
rapacity, and extortion,

*Rodgers v. Macewen*, 10 D. 882.

Baker (see Tradesman).

Bank,

To say that by the fraudulent device of the committee  
of management some of their number had been  
allowed to put their hands into the bank till.

*North of Scotland Bank v. Duncan*, 19 D.  
881.

Barrack Master,

To say that a B. was neglecting his duties and dilapi-  
dating the public stores,

*Thompson v. Gillie*, 15 F.C. 636.

Clergyman (see Minister).

Dairyman (see Tradesman).

Ecclesiastical person (see Minister and Vestryman).

Factor or Manager,

To say that a F. has been guilty of culpable manage-  
ment and neglect,

*Hallam v. Gye*, 14 S. 199.

To charge a F. with neglect of duty and with being  
unworthy to manage the affairs of a gentleman,

*Anderson v. Wishart*, 1 Mur. 429.

To say of a F. that it is not agreeable to him for his  
master to have any business where he (the F.)  
cannot have some benefit, and that he (the F.)  
does not attend to his master's orders until  
three or four days before he expects him to  
return,

*Munro v. Munro*, Hume 616.

Farmer,

To say that a F. neglects his farm and cultivates it badly,

*Dun v. Bain*, 4 R. 317.

Geographer,

To say that a G. is incompetent,

*Johnston v. Dilke*, 2 R. 386.

Hotel Keeper,

To say that he sells inferior viands at excessive prices,

*Macrae v. Wicks*, 13 R. 732.

To say of a hotel, "Nowhere have I encountered so  
"much drinking, or so much squalid untidiness  
"and dirt,"

*M'Iver v. M'Neill*, 11 M. 777.

To say that drinking and gambling goes on in the  
premises of a temperance hotel keeper,

*Carmichael v. Cowan*, 1 M. 204.

To say a man keeps a disorderly and riotous inn, and  
has committed a breach of his certificate,

*Keay v. Wilsons*, 5 D. 407.

To say that a man keeps a shebeen would, if untrue,  
be defamatory,

*Cook v. Gray*, 29 S.L.R. 247.

Insurance Company,

To impute improper business conduct to an I.

*British Legal, etc. Co. v. Pearl Co.*, 14  
R. 818.

Justice of the Peace (see Magistrate).

Law Agent,

Accusing a L. of acting fraudulently and unpro-  
fessionally,

*Bayne v. Macgregor*, 24 D. 1126.

The suspension of a L. by a Sheriff-Substitute will not



ground an action of damages by the L. against the Sheriff-Substitute,

*Hamilton v. Anderson*, 18 D. 1003, H. of L. 20 D. 14, 3 MacQ. 363.

To say that a L. conducts cases merely for his own advantage, and without regard to the interests of his client,

*M'Rostie v. Ironside*, 12 D. 74.

To say that a L. is raising extravagant actions, pleading desperate pleas, and mismanaging trust-estate,

*Manson v. Macara*, 2 D. 208.

To say that a L. is utterly destitute of the feelings of a gentleman,

*Mackay v. Campbell*, 11 S. 1031.

To charge a L. with breach of trust and acting collusively,

*Dallas v. Little Gilmour*, Hume 632.

To say that a L. made charges for outlays never incurred and for work not done.

*Grant v. Ramsay*, Hume 611.

**Magistrate,**

To charge a J. P. with breach of trust and corruption,

*Mitchell v. Grierson*, 21 R. 367.

To charge a M. with disgracing his office,

*Coghill v. Docherty*, 19 S.L.R. 96.

To say that a J. P. is unfit for his position,

*Ogilvy v. Paul*, 11 M. 776.

To say that a M. formed one of a mob,

*M'Douall v. Guthrie*, 15 D. 778.

*M'Ewan v. Mags. of Edinburgh*, M. 3434.

To charge a provost with being marked by unscrupulous rapacity to which the oath of office and every other consideration gave way ; with stealing

what he knew to be the property of the town ; and as guilty of oppressive rapine and breach of trust,

*Robertson v. Rose*, Borth. 340.

Manager (*see* Factor).

Medical man,

To say of a M. that he was ignorant how to treat the case which he had to attend to,

*Balfour v. Wallace*, 15 D. 913.

*Sharp v. Wilson*, 5 S.L.R. 444.

To say of a M. that he was "placed beyond the pale" of professional respect and courtesy." *p. L. J. C.*

*Mullar v. Robertson*, 15 D. 661.

To say that a M. drugged and debauched his patient,

*Marshall v. Renwicks*, 13 S. 1127.

But it was held not defamatory of a medical man to translate his designation "doctor medicinæ" in a Latin charter by the words "doctor of medicine," although the pursuer averred that the latter was only applied to recent graduates, and that "physician" was the proper word to design him, and had been used as the translation of "doctor" "medicinæ" occurring in other parts of the same charter,

*Memis v. Managers of Aberdeen Infirmary*,  
M. App. Delinq. 3.

Minister,

To accuse a M. of disgraceful and discreditable conduct, brawling with his parishioners, and being suspended by the Church Courts,

*Mackellar v. D. of Sutherland*, 21 D. 222.

To irregularly excommunicate an Episcopalian clergyman grounds an action,

*Dunbar v. Skinner*, 11 D. 945.

To accuse a M. of deviating from his duty as a clergyman, and desecrating the Sabbath,

*Lowe v. Taylor*, 7 D. 117.

To say of a M. that no person having grace would listen to his sermons,

*Martin v. McLean*, 6 D. 981.

To charge a Roman Catholic priest with refusing to baptize children of his parishioners unless the latter paid money for building the Church,

*Scott v. McGavin*, 2 Mur. 484.

Charging a M. with industriously creating divisions and sowing the seeds of animosities and discord in his parish,

*Sangster v. Hepburn*, Hume 617.

Missionary,

To charge a M. with indecorous and unseemly conduct, with conduct incompatible with a belief in Christianity, and with being a believer in and favourer of Mohammedanism,

*Davis v. Miller*, 17 D. 1050, 1166.

Musician (*see* Singer).

Partner,

To say a person is P. in a bogus company,

*Hustler v. Allan*, 3 D. 366.

Postmaster,

To charge a P. with opening letters,

*Warrand v. Falconer*, M. 13933.

Professor or Teacher,

To charge a P. or T. with ignorance or unfitness for his post,

*McKerchar v. Cameron*, 19 R. 383.

*Auld v. Shairp*, 2 R. 940.

*M<sup>r</sup> Bride v. Williams*, 7 M. 427.

*Sturrock v. Greig*, 11 D. 1220.

*Bryson v. Inglis*, 6 D. 363.

*Alexander v. Macdonald*, 4 Mur. 94.

*Cooper v. Greig*, Hume 648.

To say of a medical professor that by what he had said  
he "proclaimed himself to be either an impudent  
" empiric or an arrogant impostor."

*Hamilton v. Duncan*, 4 S. 414.

To say that a schoolmaster has written a writing void  
of merit, exhibiting alternate strokes of super-  
stition and blasphemy, possessing no talent for  
composition, regardless of the rules of grammar,  
and tending to foment dissensions among neigh-  
bours, and to wound the character of respectable  
persons,

*Jardine v. Creech*, M. 3438.

Sailor,

To accuse a S. of breach of discipline,

*Hill v. Thomson*, 19 R. 377.

Sheriff Officer,

To charge a S. with misfeasance in office,

*Richardson v. Wilson*, 7 R. 237.

*Richardson v. Le Conte*, 17 S.L.R. 235.

Singer,

To say a S. is unsuited to her part is not actionable,

*Crotty v. M<sup>r</sup> Farlane*, Glegg on Reparation  
501.

Solicitor (*see* Law Agent).

Telegraph Clerk,

To say that a T. divulged messages to third parties,

*Richards v. Chisholm*, 22 D. 215.

**Town Clerk,**

To charge a T. with malfeasance and oppression in office,  
*Herdman v. Young*, M. 13987.

**Tradesman (see also Hotel Keeper).**

To say that typhoid fever was traceable to a particular  
dairy,

*M'Lean v. Adam*, 16 R. 175.

To say a baker's bread is poisonous, and not fit for  
human food, seems not to be actionable, but to  
say it is adulterated is,

*Broomfield v. Greig*, 6 M. 563.

Merely to say that a tradesman does not know how to  
conduct his business is not actionable,

*Buchans v. Walsh*, 20 D. 222.

To say a man's goods are an imposition and rotten and  
mildewed trash,

*Hamilton v. Arbuthnot*, M. 13923.

**Trustee,**

To accuse a T. of untrustworthiness,

*Falconer v. Docherty*, 20 R. 765.

(See also Factor and Law Agent.)

**Vestryman,**

To say of an Episcopalian V. that he is "unworthy to  
" take part in the business and councils of God's  
" House,"

*Edwards v. Begbie*, 12 D. 1134.

## CHAPTER IX

### IMPUTATIONS ON A MAN'S PUBLIC CHARACTER

Holding up to public hatred, ridicule, and contempt, is actionable—Limits of application of rule undefinable—Position in law of expressions of contempt not clear—Person complaining of them must aver intent to injure—Granting *solatium* responsible for allowing actions of contempt—Examples—No clear principles in allowing actions for expression of contempt—Single utterance sufficient to found action of this class.

Holding up to public hatred, ridicule, and contempt, is actionable.

III. WHILE in theory great latitude is allowed in discussing the public life and actions of people, and persons when doing so enjoy a privilege which is explained *infra*, pp. 169, 182, the Scots law has reduced this protection within rather narrow bounds by a rule that to hold a person up to public ridicule, contempt, and hatred, is actionable. It therefore appears that the right and privilege of discussing the public appearances of persons is limited to a serious discussion of what they do, and that holding a person up to scorn, ridicule, and contempt, is "enough by the law of Scotland to constitute "a libel." *p. L. Deas.*

*Drew v. Mackenzie*, 24 D. 649.

L. Kincairney in the Outer House has enunciated this view of the law in so many words; and while allowing that sarcasm and ridicule may to some extent be directed against persons, he has held that a continued use of these weapons of controversy may be actionable.

*M'Laughlan v. Orr, Pollock & Co.*, 2 S.L.T. 169.

This rule of our law is one, the tendency of which is to

allow persons action for any imputation which is unpleasant, but which cannot be classified either as an imputation on their moral character, their financial position, or their status in their trade, or in their profession. Its limits of application cannot be defined. They are what the sentiments of judges or the prejudices of jurymen choose to make them. It is a rule which has denied action to a man who was called a "damned puppy,"

Limits of application of rule undefinable.

*Jameson v. Bonthron*, 11 M. 703,  
and which has allowed action to a man for being called a "snake,"

*M'Laren v. Ritchie*, Glegg on Reparation 497.

It has been laid down that "It is not every expression of contempt which is actionable." *p. L. P. Inglis*,

*Jameson v. Bonthron*, 11 M. 703,

but what "expressions of contempt" are, and what are not, it is impossible to define.

The view which judges take of the position in the law of defamation of these "expressions of contempt," is even not clear. Although L. Deas, as quoted above in *Drew's* case, said that holding a person up to contempt, etc., constituted a libel in our law, he is found, when discussing such a case in

Position in law of expressions of contempt not clear.

*Cunningham v. Phillips*, 6 M. 926,

speaking of it as one "where there is no slander," *p. 928*. If holding up to public ridicule, contempt, and scorn is not properly defamatory, action must be allowed on it because it is verbal injury. L. Kinnear, however, expressed the only clear opinion on the matter to be found in the books when he said that he would hold such expressions to be "defamatory or slanderous."

*Waddell v. Roxburgh*, 31 S.L.R. 721.

The L. P. Inglis, in *Cunningham's* case, held that a person complaining of this peculiar form of injury, must prove

Person complaining of them must aver intent to injure.

intent to injure, and L. Deas concurred in that view. The present L. P. Robertson, with that case laid before him, gave a similar ruling in a case of verbal injury.

*Paterson v. Welch*, 20 R. 744.

The soundness of this rule has been discussed *supra*, p. 10, but it must meanwhile be recognised as one to be observed by persons complaining of this sort of attack on their character.

Granting  
*solatium* re-  
sponsible for  
allowing  
actions for  
contempt.

Examples.

The rule of our law allowing *solatium* for injured feelings is no doubt in great part responsible for allowing action for "expressions of contempt," and nothing remains but to enumerate the instances where this class of case has come before the Court. The earliest is that of

*The Society of Solicitors v. Robertson*, M. 13935, where the pursuers having been incorporated by charter giving them privileges, the defender published in his newspaper an article, saying that the "Chaldeans, Cadies, or Running Stationers" of this city, encouraged by the pursuers' success, were going to apply for incorporation also, to acquire privileges, and were not going to be puffed up by success. The Court held the publication to be injurious, and awarded damages. The next case is that of

*Hamilton v. Stevenson*, 3 Mur. 75,

where it had been said of the pursuer that he corresponded with the lower orders to stir up discontent and cause public mischief, and where hints were thrown out against his loyalty. This was held actionable. A similar decision was come to about the same time in

*Leslie v. Blackwood*, 3 Mur. 157,

where it had been said of a Professor of Natural Philosophy that he was ignorant of Hebrew, criticised what he did not understand, was a parrot, and an *enfant perdu*, etc. In the case of

*Menzies v. Goodlet*, 13 S. 1136,



it was held that to call a man a coward and a scoundrel, and shortly to hold him up to public contempt, was actionable. In

*Lowe v. Taylor*, 7 D. 117,

an issue of holding up to discredit and contempt was granted where a newspaper had criticised the action of a minister, and had suggested that his actions were seditious. Again, in

*Graham v. Roy*, 13 D. 634,

*Kennedy v. Allan*, 10 D. 1293,

it was held actionable to say that a man was a common informer, for he would thus be held in public hatred and contempt. It has not yet been decided, for the same reason, that to call a person a policeman is actionable.

In the case of

*Sheriff v. Wilson*, 17 D. 528,

the pursuer complained of a series of articles published in a newspaper. Some of them contained matter which was *per se* actionable, and on which issue was allowed. Part of them, however, though probably offensive to the pursuer, amounted to nothing more than a suggestion that he was indolent and gluttonous. On this, issue was allowed, asking whether the articles were written in pursuance of an intention to expose the pursuer to ridicule and contempt, to wound his feelings as an individual, and to degrade him in the estimation of the society in which he resides. There the L. J. C. Hope remarked: "Taking each of the articles by itself there may be nothing either defamatory or injurious to a man's feelings, but we must look at them as part of a series of "such articles," and so looking at them, the Court held that it was for a jury to decide whether the pursuer was entitled to damages. In the case of

*Drew v. Mackenzie & Co.*, 24 D. 649,

the pursuer had been criticised in a newspaper, and it had been said of him and another that they "were sturdy, bold,

"and unblushing repudiators," that "they acted like thimble-riggers—heads, I win; tails, you lose." The article could be innuendoed into a distinctly libellous meaning, and was so innuendoed by the Court. But the summons was based also on the contention that the article "held up the pursuer to scorn, ridicule, and contempt in the eyes of the public," and the majority of the judges treated this as sufficient by our law to entitle the pursuer to damages. Again, in

*Cunningham v. Phillips*, 6 M. 926,

where a series of newspaper articles were complained of, which undoubtedly contained libellous matter, the Court, L. Deas dissenting, allowed a general issue of whether they held up the pursuer to "public hatred, contempt, and ridicule." L. Deas pointed out that in Sheriff's case issues were allowed on what was distinctly libellous, and that it was only after this had been done that a general issue of "hatred and contempt" was allowed as to the effect of the articles as a whole. The case of

*M'Laren v. Ritchie*, Glegg on Reparation 497,

was one where an issue of this sort was allowed against a newspaper, which, in discussing the candidature of the pursuer for Parliament, had likened him to a "viper" and a "snake in the grass." On the other hand, in

*Jameson v. Bonthron*e, 11 M. 703,

no action was allowed against the defender, who had called the pursuer a "damned puppy," though in the case of

*Hyslop v. Staig*, 1 Mur. 15,

similar words were treated as actionable. In the case of

*M'Laughlan v. Orr, Pollock & Co.*, 2 S.L.T. 169,

a member of Town Council complained of a series of articles relating to him in a newspaper, and published over a period of two years. L. Kincairney allowed an issue, holding, no doubt rightly, that it was for the jury to decide whether they held up to public scorn. At the same time, his lordship in

his opinion seems to have illustrated the folly of allowing action on such cases. He admitted that sarcasm and ridicule might be used against a public man, and might be entitled to the protection which the law extends to criticism of persons in their public appearances. But he seems to have indicated that if they are resorted to for a long period and continuously used, the person ridiculed may have an action for holding up to contempt. This, in other words, means that if a public man makes himself ridiculous once or twice, it may be pointed out; but if he continues to do so, and some one continues to show that he does, the latter will have an action for being held up to contempt. Another recent case where action was allowed on the footing that the pursuer had been held up to "public hatred and contempt" is that of

*Paterson v. Welch*, 20 R. 744.

There the pursuer complained that, he being a candidate for municipal honours, the defender had stated that he (the pursuer) had expressed views which, if he had really expressed them, would have been very unpopular; that he had thus been held up to public hatred and contempt, and had suffered injury thereby. This case does not belong in reality to the same category as others just cited. It was really based on verbal injury—actual injury inflicted on the pursuer by statements about him not directly defamatory of him. Its proper place is under the heading of verbal injury, and it is mentioned here because the form of issue allowed in it was one of holding up to "public hatred and contempt."

In view of the volume of decisions that imputations which hold up to public hatred, contempt, scorn, and ridicule are actionable, it is perhaps out of place to criticise this rule of our law further. It is a rule fixed on no clear and well-defined principle. It is a rule which permits the law to

No clear principle in allowing action for expressions of contempt, etc.

be the handmaid of passion and sentiment, and to be the judge of æsthetics in criticism.

Single utter-  
ance sufficient  
to found action  
of this class.

The holding up to public hatred, ridicule, and contempt, may be effected in a single utterance, though an impression has prevailed, probably founded on the cases of Sheriff, M'Laren, and Cunningham, that it could only be effected by a series of attacks. In fact those are the only cases, with the addition of the recent case of M'Laughlan, where a person complained of a series of attacks as having had the effect of holding him up to public hatred, etc.

## CHAPTER X

### IMPUTATIONS ATTRIBUTING INSANITY OR OBNOXIOUS PHYSICAL DEFECTS

Imputations of insanity and of physical defects are actionable—Does *veritas* excuse in these cases?—English law as to imputations of disease—Are imputations of this class properly defamatory, or verbal injuries?

IV. FALSE allegations that a person is of unsound mind will found an action for defamation,

*Hendersons v. Henderson*, 17 D. 348,

*Mackintosh v. Weir*, 2 R. 877,

Imputations of insanity and of physical defects are actionable.

and therefore a doctor granting a certificate of insanity renders himself liable in damages to the alleged lunatic if the latter were not really insane.

*Strang v. Strang*, 11 D. 378.

*Mackintosh v. Frazer*, 22 D. 421.

Although no cases have occurred in Scotland where a person has complained of another having falsely stated that he suffered from some physical defect or noisome disease, there can be no doubt that a false statement to that effect made about a person will found an action for defamation. See L. Deas' opinion on p. 928 in

*Cunningham v. Phillips*, 6 M. 926.

Lord Deas, however, there seems to suggest that such a statement need not be false to entitle the person complaining of it to damages. This opinion is *obiter*, and is contrary to the accepted rule that *veritas convicii excusat*.

Does *veritas* excuse in these cases?

English law as  
to imputations  
of disease.

In England it is slanderous to say that a person is suffering from the more noisome diseases, as his being in that condition will cause him to be shunned by society.

*Bloodworth v. Gray*, 7 M. & Gr. 334.

A mere statement, however, that he has suffered will not entitle him to damages.

*Carlake v. Mapledoram*, 2 T.R. 473.

Though it might be suggested that a statement that a person had suffered from venereal disease is actionable, being innuendoed that he had led an immoral life.

Are imputa-  
tions of this  
class properly  
defamatory or  
verbal injuries?

There seems some doubt whether imputations of this class ought to be regarded as properly defamatory or as verbal injuries. The doubt arises from *L. Deas* in *Cunningham's* case speaking of them as being no slander. It would, however, seem right to regard them as properly defamatory, and this view is borne out by the issue granted in *Henderson's* case, 17 D. 348, which was in the ordinary form for defamation proper.

## CHAPTER XI

### VERBAL INJURIES

Persons may be injured by imputations not directly defamatory—Conditions on which actions for verbal injury are allowed—Instances of verbal injury not numerous—Two classes: (a) Verbal injury where there is reflection on character—Examples—(b) Verbal injury where there is no reflection on character—Examples.

V. THERE is no doubt that a person may suffer injury owing to a false imputation made by another, although the false imputation is not directly defamatory of him. It will be generally found that such false imputations indirectly contain some reflection on the injured person's reputation, but they do not in all cases. L. Kinnear has expressed the opinion that all "actionable" words which reflect on the character or credit of a person, or hold him up to contempt, should be called defamatory.

Persons may be injured by imputations not directly defamatory.

*Waddell v. Roxburgh*, 31 S.L.R. 721.

But there are many words not "actionable" which may cause reflection on character. The law will allow a person complaining of such as having injured him to recover damages in respect of them on three conditions; *first*, that they are proved false; *second*, that they were made without lawful occasion; *third*, that they have caused actual damage. The injury caused in this way is called verbal injury to distinguish it from defamation. It will be seen from the above conditions requisite for obtaining damages

Conditions on which actions for verbal injury are allowed.

for verbal injury that it differs considerably from defamation proper. In the latter the imputations are presumed false, they are usually presumed to have been uttered unwarrantably, and they are presumed to have caused damage. In verbal injury these presumptions do not exist, and the person complaining has to prove the falsity of the imputation, that it was uttered without lawful occasion and that it has caused damage.

Nothing requires to be said about the necessity of proving that the imputation complained of was false. With regard to the need of establishing that the imputation was uttered without lawful occasion, and to the requirement of proof of damages, reference is made to Chapter II.

Instances of  
verbal injury  
not numerous.

The number of instances in the Scots law which can be cited as examples of verbal injury is not great. It must, however, be remembered that some of the cases of defamation on persons in their trade, business, or profession, and especially those quoted on p. 63, are, properly speaking, specimens of verbal injury. It is also obvious that classification of instances of verbal injury is difficult; any imputation, however innocent, which is false, uttered without lawful occasion, and productive of damage, being actionable. But cases of verbal injury may be divided into two fairly distinct classes: (a) Those where the person complaining avers that the imputation produces an injurious reflection on him; and (b) those where the person complaining does not allege that the statement reflected on him, but does say that it has caused him damage.

Two classes.

(a) Verbal  
injuries where  
there is reflec-  
tion on charac-  
ter.

(a) Where the complainer avers that the imputation, though not directly defamatory of him, has produced an injurious reflection on him, it will necessarily fall into one or other class of imputations properly defamatory. Thus it was held in

Examples.

*Kennedy v. Allan*, 10 D. 1293,



that the pursuer was entitled to damages because the defender had circulated amongst the pursuer's business connection a copy of a letter from the Inland Revenue asking the defender to show cause why he should not be proceeded against for having granted an unstamped receipt to the pursuer. Here the pursuer maintained that the defender by his action had intended to suggest that the pursuer was a common informer, for not otherwise could the Inland Revenue have known that an unstamped receipt was given. To have charged a man with being a common informer would have been actionable (see p. 55), and therefore this act which would suggest that he was, was held actionable also. Again in

*Outram v. Reid*, 14 D. 577,

a newspaper published a list of bankrupts, giving only their names, trades, and the towns they lived in. A person bearing the same name, carrying on the same trade, and residing in the same town as one of the actual bankrupts mentioned in the list, sued the newspaper because, owing to the omission of the address, people had understood that the pursuer was bankrupt. The pursuer was held to have a good ground of action. In the case of

*Richards v. Chisholm*, 22 D. 215,

the pursuer, a telegraph clerk, complained that the defender had stated that he had been in the office where the pursuer worked, and could give the words of a message which was received by the pursuer. The pursuer maintained successfully that such a statement suggested that he had betrayed confidence, and had culpably divulged messages, and action was allowed. In the case of

*Paterson v. Welch*, 20 R. 744,

the pursuer complained that the defender had stated that the pursuer had said that the children at a school would be "contaminated" if another class of children were admitted. The pursuer was held entitled to an issue whether the statement

made by the defender was false, and held up the pursuer to public hatred and contempt. But when the pursuer complained of a letter in a newspaper on the ground that it suggested that he was the author of it, and represented him as being bloodthirsty and fanatical, it was held that to make such suggestions about a man was *per se* defamatory, and that therefore the pursuer was entitled to an issue as for defamation, and not as for verbal injury.

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

With the utmost deference the issue granted in this case must be criticised. The case seems to be one really of defamation by act, but an issue was granted asking whether the statements in the letter falsely, etc., represented that the pursuer had written a letter for publication in which he incited to riot and bloodshed. The statements in the letter made no such representation. What was complained of was not any statements in the letter, but the act of inserting the letter, which act, taken with the letter, suggested the pursuer's authorship of the letter. A curious case is reported in Borthwick, p. 388,

*McDonald v. McDonald*,

where a person was allowed action because the defender advertised the marriage of the pursuer and the birth of her first child within five months of the marriage, so as to suggest ante-nuptial illicit connection between the pursuer and her husband.

(b) Verbal injuries where there is no reflection on character. Examples.

(b) Cases of verbal injury, where the pursuer does not allege that the statement made any reflection on him, but that it has caused him injury. Among these cases the most important are those of "slander of title," where a person has falsely said that another has not the right to dispose of the goods he wishes to sell. A case of this kind arose in

*Philip v. Morton*, Hume 865,

where the pursuer was held entitled to damages from the

defender, who had made such a statement. This case must be contrasted with

*Yeo v. Wallace*, 5 S.L.R. 253,

where a landlord's agent had come to a sale of the pursuer's (the tenant's) goods, and had declared that the sale could not proceed unless caution for next year's rent was found. In that case the action was held irrelevant. But it must be noticed that the landlord's agent had not questioned the pursuer's right to the goods, and had not stated that his right had been curtailed by completion of the landlord's right of hypothec over them. The decision would probably have been different if the landlord's agent had falsely stated that the goods could not be sold as the landlord had sequestered them for rent.

In the case of

*North of Scotland Bank v. Duncan*, 19 D. 881,

a bank was held entitled to action on an averment that its credit had been shaken by a statement by the defender that members of the committee of management had taken money out of its till, through the fraudulent device of other members. It is obvious that such a statement, though not made of the bank, might be most injurious to it. Lord Deas, in his opinion in this case, pointed out that one person might well suffer injury by something said of another. Thus one daughter might have grave injury done to her by an attack on the character of her sister. In such a case, Lord Deas said that the person thus indirectly injured would require to aver an intention on the part of the utterer to injure him before he could recover damages. This proposition, as has been pointed out (p. 10), probably is rather in excess of the law's requirement. A case almost identical with the one figured by Lord Deas occurred in the middle of last century, when a woman sued another for having said, *inter alia*, that the pursuer's father was a footman, and her mother kept a

bawdy - house. There were, however, further imputations directly against the pursuer herself, and as the case was disposed of on different grounds, it does not amount to a direct authority on the point.

*Symmond v. Williamson*, M. 3435.

## CHAPTER XII

### DEFAMATORY IMPUTATIONS ON WHICH ACTION HAS BEEN REFUSED

Actions refused on defamatory words when uttered in *riza* or retort —  
Examples are mostly of spoken defamation—Examples: (I.) Imputations against moral character: (a) Imputations of crime; (b) Imputations of immorality not necessarily punishable; (c) Imputations of general misbehaviour, and of social offences—(II.) Imputations against a man in his trade, profession, etc.—(III.) Verbal injuries.

ACTION is sometimes refused on undoubtedly defamatory imputations. This is done when it plainly appears that the imputation was uttered in *riza*, and that no one had taken it seriously, or when it is made by way of retort. The examples of refusal to allow action for imputations undoubtedly defamatory when spoken in *riza* are almost exclusively cases where the imputation has been uttered orally, and it would seem desirable that they should be limited to such. The idea at the basis of the rule is very much the same as that which in the English law refuses action in certain cases for slander, *i.e.* spoken words; when it allows it for libel, *i.e.* written words. Persons who sit down to write defamatory imputations of others certainly do so with some deliberation, and if they cannot then restrain their tempers it is not clear that the law should be lenient towards them if they write what is defamatory. There is, however, one case in the books where action was refused for written imputations undoubtedly

Action refused on defamatory words when uttered in *riza* or retort. Examples are mostly of spoken defamation. |

defamatory. The decision seems to have turned partly on the ground that the words were written in *rixa*, partly on the ground that they were compensated by other words written by the pursuer, and partly on the ground that the whole case was frivolous. The accusation made against the pursuer was that he had deserted his wife and had committed adultery. The pursuer had made bad charges against the defender, and he was refused damages.

*Lovi v. Wood*, Hume 613.

It is doubtful whether in these days of jury trial the decision would be the same. It has, however, been laid down quite recently that when one person attacks another, the latter is entitled to reply as publicly as the person made his attack.

*Gray v. Scottish Society for the Prevention of Cruelty to Animals*, 17 R. 1185.

And it is permissible in retort to characterise the statements of the other party as "absolutely untrue," without rendering one's self liable in damages.

*Brodie v. Dowell*, 2 S.L.T. 9.

Similarly if persons entitled to make a request do so, and the person to whom it is addressed, in refusing it, gives reasons which reflect on the character of the former, the Court may refuse action based on the statements made, on the ground that though defamatory they were permissible in the circumstances.

*Dixons v. Murray*, 1 S.L.T. 494.

Examples.

The instances of refusal of action on imputations undoubtedly defamatory, can be arranged under the several headings of defamatory imputations already treated.

I. Imputations  
against moral  
character.  
(a) Imputa-  
tions of crime.

I.—Charges against moral character.

(a) Imputations of crime :—

Murder, to accuse a man of, in *rixa*, held not actionable,

*Harkness v. M'Kenzie*, Borthwick 343.

Prison, to say that you will put a man in, when spoken in *riza*, held not actionable,

*Cockburn v. Reekie*, 17 R. 568.

Swindling blackguard, to call a man a, in *riza*, doubted whether actionable,

*Young v. Inglis*, Hume 608.

Thief and robber, to call a man a, in *riza*, held not actionable,

*Cusine v. Begbie*, Hume 622.

*Ewart v. Mason*, Hume 633.

(b) Charges of non-criminal immorality :—

Adultery, to charge a man with, in *riza*, held not actionable,

*Lovi v. Wood*, Hume 613.

(b) Imputations of immorality not necessarily punishable.

Bitch, to call a woman a damned eternal, not actionable when spoken in *riza*,

*Shand v. Finnie*, Hume 612.

Cheat, to call a man a, in *riza*, not actionable,

*Ewart v. Mason*, Hume 633.

Liar, to call a man a, in *riza*, not actionable,

*M'Crae v. Stevenson*, Hume 631.

*M'Laren v. Robertson*, 21 D. 183. p. L. Curriehill.

*Watson v. Duncan*, 17 R. 404. p. L. M'Laren.

Street Walker, to call a girl a, meaning thereby a prostitute, held not actionable in

*M'Neill v. Forbes*, 10 R. 867.

Whore, to call a woman a, in *riza*, not actionable,

*Purdon v. Buchanan*, Hume 608.

*Brown v. Fernie*, Hume 643.

*Reid v. Scott*, 4 S. 5.

(c) Charges of general misbehaviour and of social offences :—

Blackguard, to call a man a, in *riza*, not actionable,

*M'Crae v. Stevenson*, Hume 631.

*Macintosh v. Squair*, 40 Scot. Jur. 561.

(c) Imputations of general misbehaviour, and of social offences.

Insobriety, a charge of, made in *rixa*, is not actionable,

*Friend v. Skelton*, 17 D. 548.

*Macdonald v. Rupprecht*, 21 R. 389.

Rascal, to call a man a, in *rixa*, not actionable,

*Cusine v. Begbie*, Hume 622.

*M'Crae v. Stevenson*, Hume 631.

*Ewart v. Mason*, Hume 633.

Rogue, to call a man a, in *rixa*, not actionable,

*Cusine v. Begbie*, Hume 622.

Scamp, to call a man a, in *rixa*, not actionable,

*Macintosh v. Squair*, 40 Scot. Jur. 561.

Scoundrel, to call a man a, in *rixa*, not actionable,

*Cusine v. Begbie*, Hume 622.

*Macintosh v. Squair*, 40 Scot. Jur. 561.

Vagabond, to call a man a, in *rixa*, not actionable,

*M'Crae v. Stevenson*, Hume 631.

Villain, to call a man a, in *rixa*, not actionable,

*Cusine v. Begbie*, Hume 622.

II. Imputa-  
tions against a  
man in his  
trade.

II.—Charges against a man in his trade, business, or profession :

Bankruptcy. To publish that a person was bankrupt was held in special circumstances not to infer liability for damages, as no damage was proved to have followed,

*Craig v. Hunter & Co.*, 15 F.C. 371.

III. Verbal  
injuries.

This case would also fall under—

III.—Verbal Injury. A newspaper had published the name of James Craig as being a bankrupt, designing him shoe merchant. In reporting subsequent proceedings in his case the newspaper designed him John Craig. A person of that name, conducting the same trade in the same town, complained, and the newspaper inserted a correction. A short



time after, the father of the bankrupt, who was also called John Craig, and who was a shoemaker, and who had also become bankrupt in the interval, sued the newspaper, alleging that his bankruptcy had been brought about by the newspaper's mistake. Of this there was no proof, and the Court held that to support the action there must be evidence either of *animus injuriandi* or of patrimonial loss, and that as there was evidence of neither, the defenders must be assoilzied. It must be noticed, however, that this was a decision on facts, and that the ground for holding the defenders not liable was neither that the words were uttered in *rixa* nor that they were published by way of retort.

## CHAPTER XIII

### IMPUTATIONS HELD NOT DEFAMATORY

Imputations held not defamatory—Examples—I. Imputations complained of as reflecting on moral character: (a) As accusations of crime; (b) As accusations of immorality not necessarily punishable; (c) As accusations of general misbehaviour and of social offences—II. Imputations complained of as being defamatory of a man in his trade, etc.—III. Imputations complained of as holding up to public hatred, ridicule, and contempt.

Imputations held not defamatory.

It is desirable to collect in one place the more important cases of words and imputations which have come under the notice of the Court, and which have been held to be not defamatory. They can be classified under the various heads of defamatory imputations already treated of, being placed under that head which it was sought to bring each of them under by the person who complained of them.

I. Imputations complained of as reflecting on moral character.  
(a) As accusations of crime.

I. Imputations complained of as being against the moral character of the pursuer:

(a) Cases where the pursuer maintained that crime was imputed to him:—

A message girl was sent with articles to deliver them at a house. The person to whom they were addressed stated that they had never been delivered. It was held that the message girl could not sue on this as being an imputation that she had stolen the articles.

*Mitchell v. Steele*, 11 S.L.R. 364.

Again, a newspaper, writing about a publican who, in face of a recommendation of the magistrates to publicans

to close their houses on a particular day, had kept his open, advised the magistrates to consider this publican's conduct at the next Licensing Court. It was held that the publican could not sue on the ground that the newspaper had thereby represented that the publican had acted illegally.

*Meikle v. Wright*, 20 R. 928.

L. M'Laren in

*Cockburn v. Reekie*, 17 R. 568,

laid it down that unmeaning abuse and mere vituperation will not ground an action for defamation, and in that case the view was upheld where the words, spoken in temper, were, "I will put you in prison." On the other hand, it was held in

*Miller v. Mackay*, 16 F.C. 360,

that abusive language without any specific accusation grounds an action for defamation.

It is also not defamatory to say that the judgment of a Court in a particular case should have been the other way, even though, had it been so, the pursuer would have been convicted of an offence.

*Gray v. Scottish Society for the Prevention of Cruelty to Animals*, 17 R. 1185. *p.* LL. Shand & M'Laren.

To say that a man has abducted a girl is not defamatory of him if the girl is not in pupillarity, although she be under eighteen, if it is not suggested that he abducted her for immoral purposes, because simple abduction is not criminal.

*Abinet v. Fleck*, 2 S.L.T. 30.

(b) Cases where the pursuer maintained that immorality not necessarily punishable was imputed to him :—

The pursuer complained that the defender had written of him that he (the pursuer), after having done a particular act, "voluntarily assured" another that he had not done it. This statement was held not to be *per se* defamatory, and action was refused.

(b) As accusations of immorality not necessarily punishable.

*Kennedy v. Baillie*, 18 D. 138.

A minority of the Court in this case dissented, and the case seems a very doubtful precedent.

(c) As accusations of general misbehaviour or of social offences.

(c) Cases where the pursuer maintained that general misbehaviour or the commission of a social offence was imputed to him :—

It is not libellous to call a publican a “black sheep” because he did not conform to a recommendation by the magistrates to close his public-house on a particular day.

*Meikle v. Wright*, 20 R. 928.

It is not actionable to describe a man’s actions as “crooked ways” or “sharp practice.”

*Archer v. Ritchie*, 18 R. 719.

Nor is it necessarily libellous to write of them as being “dishonourable,” or to speak of them as “disgraceful.”

*Turnbull v. Oliver*, 19 R. 154.

*Craig v. Jex Blake*, 9 M. 973. *p. L. Deas.*

In the case of

*Meikle v. Wright*, 20 R. 928,

it was held not actionable to say that “disgraceful” scenes occurred in a street outside a public-house, when it was not said that the publican was the cause of the scenes.

A decree of suspension for contumacy regularly pronounced by a dissenting kirk-session will not ground an action for defamation.

*Thallon v. Kinninmont*, 18 D. 27.

Nor will a suspension of a procurator by a sheriff-substitute do so.

*Hamilton v. Anderson*, 18 D. 1003, 3 MacQ. 363.

It also appears that to say that a man used “foul language” and was “one of the leaders” of a riot is not, without an innuendo, libellous.

*Craig v. Jex Blake*, 9 M. 973. *p. L. Deas.*

It is also not defamatory to state that a person spread defamatory rumours and wrote lewd language, unless the

pursuer states what were the defamatory reports and lewd language which the defender had imputed to him.

*Milne v. Smiths*, 20 R. 95.

Nor is it libellous to describe a person's conduct as "mean."

*Ray v. M'Lay*, 14 D. 988.

*Fraser v. Morris*, 15 R. 454.

A mere charge of partiality is not defamatory,

*Falconer v. Docherty*, 20 R. 765,

and may not be so even when made of a referee,

*Grant v. Smith*, 15 S. 558.

The L. P. M'Neill in

*Drew v. Mackenzie*, 24 D. 649,

was of opinion that the word "repudiator" is not, in itself, defamatory.

II. Imputations complained of as being injurious to a man in his trade, business, profession, or occupation :—

It is not libellous for a town councillor to charge a town official with breach of duty if made in the council.

*Neilson v. Johnston*, 17 R. 442.

But this case depends rather on the privilege enjoyed by a town councillor in discussing the town officials, and really does not amount to an affirmation of the abstract proposition that it is not libellous to make such a statement. It must be noticed that the L. P. Inglis in

*Cockburn v. Reekie*, 17 R. 568,

said there was nothing slanderous in charging a man with incompetence for his duties. This remark was *obiter*. It was said of a clerk in a mercantile firm. There is no reason for the law to presume competence in such an individual, and if the rule suggested (p. 61) be sound the L. P.'s remark can be justified. But the *dictum* seems contrary to law if the pursuer had complained of the charge and had offered to establish his competency.

II. Imputations complained of as being defamatory of a man in his trade, etc.

Criticism of a man in his public capacity, so long as it does not enter into his private relations, is not actionable.

*p. L. O. Fraser in*

*Coghill v. Docherty*, 19 S.L.R. 96.

This applies to all men who place themselves or their works before the public. "That publication therefore I shall never consider as a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentation of fact—to refute sophistical reasoning—to expose a vicious taste in literature, or to censure what is hostile to morality." *p. L. Ellenborough.*

*Tabart v. Tipper*, 1 Camp. N.P. 350, 10 R.R. 698.

Quoted with approval by the L. C. C. in

*Leslie v. Blackwood*, 3 Mur. 157.

It is not clear what is the true light in which to regard this immunity afforded to those criticising public men and affairs. The accurate view seems to be that what is defamatory of a man if said of him in his private capacity is also defamatory if said of him in his public position; but that in the latter case the utterer will be partially shielded by a presumption that he spoke for the public good. This matter is discussed in the chapter on Qualified Privilege.

In accordance with the rule as laid down by L. Ellenborough and L. Fraser it has been held that a charge of insincerity against a man in his public capacity is not libellous. *p. L. M'Laren.*

*Godfrey v. Thomsons*, 17 R. 1108.

And in a medical controversy a statement by one side that statements by the other side had been declared to be all utterly devoid of truth is not a libel, but fair criticism. *p. L. J. C. Hope.*

*Mullar v. Robertson*, 15 D. 661.

The publication of exact statements relating to men in

their financial relations is not defamatory. Thus it was held that to publish an excerpt from the Register of Protests is not a libel on the man whose bill has been protested.

*Newton v. Fleming*, 6 Bell's App. 175.

Similarly in

*Outram v. Reid*, 14 D. 577,

the L. P. Boyle said : " If they " (newspapers) " publish what " the *Gazette* authorises them to do, no one can complain." But the copy must be correct (*p. L. Fullerton*). Publishing a statement in a black list that decree in absence has been obtained against a man, when such a decree has been obtained, is not actionable,

*Taylor v. Rutherford*, 15 R. 608 ;

but if the black list contains a statement that perhaps some of the persons in it may have credit given them, action will be allowed,

*Andrews v. Drummond*, 14 R. 568,

and the statement in the black list must be scrupulously correct.

*Rarity v. Stubbs*, 1 S.L.T. 74.

It is also not actionable to suggest that a man is poor,

*McLaren v. Robertson*, 21 D. 183.

A curious case is reported, where a doctor complained of injury to him in his profession owing to his designation of "*medicinæ doctor*" in a Latin charter having been translated "doctor of medicine" instead of "physician," the former being only applicable, according to his statement, to young practitioners ; the latter being the proper English designation for a man of standing and experience. The translation was held not to be defamatory.

*Memis v. Managers of Aberdeen Infirmary*,

M. App. Delinq. 2.

There is one decision which supports the proposition that

a positive statement about a person's merchandise is not actionable.

*Broomfield v. Greig*, 6 M. 563.

There it was held that to say a baker's bread is poisonous and not fit for human food is not defamatory. This case cannot be reconciled with others cited (p. 64), and is of doubtful authority. If action could not be allowed on such words as being properly defamatory it certainly should be on the ground of verbal injury.

III. Imputations complained of as holding a man up to public hatred, ridicule, and contempt.

III. Imputations complained of as holding up a man to public hatred, contempt, or ridicule :—

Falling under this head there is one case where action was refused. That is the case of

*Jameson v. Bonthron*, 11 M. 703,

where it was held that a man was not entitled to action for being called a "damned puppy," and where L. Deas expressed the opinion that no one attached a meaning to the word "damned." It must, however, be noted that in

*Hyslop v. Staig*, 1 Mur. 15,

a similar imputation was, *inter alia*, treated as actionable.



## CHAPTER XIV

### THE INNUENDO

Innuendo, what—When required—Two degrees of ambiguity in words alleged to be defamatory—Words apparently innocent—Facts and circumstances must be set forth—Words of double meaning—No need to set forth facts and circumstances—Facts and circumstances which will support an innuendo—Facts and circumstances which will not support an innuendo—Court must be satisfied innuendo is reasonable—Rule of construction of meaning of words—Duty of jury in construing words—Innuendoes employed in three circumstances—Must generally be stated on record—How stated on record—How stated in issue—Alternative innuendoes, when permissible—Examples of innuendoes—I. Utterances innuendoeed into imputations on moral character: (a) Innueendoes of crime; (b) Innueendoes of immorality not necessarily punishable; (c) Innueendoes of general misbehaviour and of social offences—II. Utterances innuendoeed into imputations against a man in his trade, etc.: (a) Innueendoes of unfitness; (b) Innueendoes of neglect of duty; (c) Innueendoes of misconduct in office; (d) Innueendoes of direct injury to business; (a) Innueendoes of general injurious statements; (β) Innueendoes of financial difficulties.

WHEN a person complains of words being defamatory of him, and their defamatory meaning is not plain and obvious on the face of them, he requires to innuendo them, that is, to set forth the defamatory meaning which he states, and which he offers to prove, that they bear. “The object of an “innuendo is to make the defamatory meaning unequivocally “clear and definite.” *p. L. Deas.*

*M'Laren v. Robertson*, 21 D. 183.

An innuendo is not required where the words complained of are unambiguous, but is where they are ambiguous. *p. L. P. Inglis.*

Innuendo,  
what.

When required.

*Gudgeon v. Outram*, 16 R. 183.

*Sheriff v. Wilson*, 17 D. 528.

An innuendo is sometimes, however, placed upon words which are undoubtedly defamatory to focus them when they occur among other statements which are not defamatory.

*Neilson v. Johnston*, 17 R. 442.

*Faulks v. Park*, 17 D. 247.

*Skinner v. Dunbar*, 13 D. 1217.

*Bryson v. Inglis*, 6 D. 363.

No words therefore are actionable as being properly defamatory (though they may be so as having caused verbal injury) unless they are obviously defamatory, or can be innuendoed to bear a meaning, not clear on the face of them, which is so.

Two degrees of ambiguity in words alleged to be defamatory. Words apparently innocent.

There are two different degrees of ambiguity in the meaning of words which are alleged to be defamatory. Some words are apparently innocent, others are of such doubtful meaning that they may be understood in either a defamatory or in an innocent sense.

*Sexton v. Ritchie*, 17 R. 680, 18 R. (H. of L.) 20.

Facts and circumstances must be set forth.

In the case of a person complaining of words apparently innocent, he must state the innuendo which he puts on them, and set forth facts and circumstances, from which, if proved, it may be inferred that they were not used in their innocent but in that defamatory sense. *p. L. C. Selborne*, p. 748.

*Capital, etc. Bank v. Henty*, L.R. 7 App. Ca. 741.

Words of double meaning.

No need to set forth circumstances.

On the other hand, if the words complained of are susceptible of either a defamatory or an innocent meaning, the pursuer has merely to set forth an innuendo, which will consist of words synonymous with the words complained of in their defamatory meaning.

*Rodgers v. Macewen*, 10 D. 882.

In the first case, if the pursuer fails to set forth facts and

circumstances which, if proved, would give the apparently innocent words a defamatory meaning, the Court will not allow action on the words.

*Kennedy v. Baillie*, 18 D. 138.

*Brydone v. Brechin*, 8 R. 697.

In the second case, if the Court is of opinion that the words complained of are "reasonably capable" of a libellous meaning it will allow the pursuer to have the question decided by a jury whether they bore that meaning.

*Cunningham v. Duncan*, 16 R. 383.

*Sexton v. Ritchie*, 17 R. 680, 18 R. (H. of L.) 20.

It is practically impossible to state what facts and circumstances will, if averred, be sufficient to justify an innuendo put on apparently innocent words. They differ with every case. But a few instances may be suggested of statements which, if made on record, would tend to support an innuendo. Thus if the word complained of, though it had a perfectly innocent meaning in ordinary speech, was stated to have a special and objectionable meaning either in the part of the country where it had been used, or among the particular class of people to whom it was uttered, this would be a fact by which the defamatory innuendo might be supported. Again, if the language complained of was uttered on an occasion when it was obvious the defender was not in a favourable mood towards the pursuer, this might be a circumstance justifying the innuendo put on the defender's words. Thus "pretty fellow" received an innuendo in

Facts and circumstances which will support an innuendo.

*Ingram v. Russell*, 20 R. 771.

Again, the whole past relations of the pursuer and defender may be set forth as facts giving point and meaning of a defamatory nature to the words used by the defender.

*Inglis v. Inglis*, 4 M. 491.

The constant reiteration without any sufficient cause of an apparently innocent statement to persons who from any

reason whatever would look for a further or other meaning in it than that it apparently bore, might be a fact to support an innuendo on words *prima facie* innocent. A noticeable omission of the pursuer's name in speaking of a body of persons with whom he was associated might possibly be a fact giving a defamatory meaning, so far as the pursuer was concerned, to some of the innocuous statements made about his associates. The tone of voice in which the words were uttered may be the fact to give them a defamatory complexion. Or the fact that the words complained of stood in strong antithesis to others uttered at the same time, may give support to the innuendo. But the facts and circumstances stated in support of the innuendo must be such as existed at, or anterior to, the time of the utterance of the alleged defamatory matter. And thus when a bank sued for defamation, alleged to be contained in a circular apparently innocent in meaning, the fact that there had been a run on the bank after the issue of the circular was held not to be one which would give support to the defamatory innuendo put by the bank on the circular.

Facts and circumstances which will not support an innuendo.

*Capital, etc. Bank v. Henty*, L.R. 7 App. Ca. 741.

Court must be satisfied innuendo is reasonable.

Although a pursuer is usually allowed to prove his innuendo, *p. L. P. McNeill*,

*North of Scotland Bank v. Duncan*, 19 D. 881,

"the Court must be satisfied that upon a sound and fair construction the words will bear the meaning assigned, and if so, whether they are actionable or not; otherwise the pursuer would have it in his power, by arbitrarily interpreting the words complained of, to make any words, however truly incapable of bearing the meaning attributed to them, a sufficient ground for instituting the action, and having it sent to a jury." *p. L. Wood*.

*Mullar v. Robertson*, 15 D. 170.

The Court is not entitled to withhold the case from the

jury unless it is satisfied that the innuendo put upon the words complained of is unreasonable. *p. L. Adam.*

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

Whether the words used are capable of supporting the innuendo proposed is therefore a question for the judge, and whether they actually do so is for the jury, but the judge at the trial may direct the jury that on the evidence there is nothing to substantiate the innuendo.

*Johnstone v. Dilke*, 2 R. 836.

The question therefore for the Court to decide is, whether the innuendo can be reasonably extracted from the words used. *p. L. Shand.*

*Campbell v. Ferguson*, 9 R. 467.

Or, as the L. P. Inglis put it in

*Mackay v. McCankie*, 10 R. 537,

whether the innuendo is reasonable and not repugnant to the natural meaning of the words. It must be observed, however, that "it is quite possible to form an innuendo from words spoken in exactly the opposite way in which they "are meant." *p. L. Neaves.*

*Caldwell v. Munro*, 10 M. 717,

as when a person speaks ironically, and calls another a pretty fellow.

*Ingram v. Russell*, 20 R. 771.

But "I think it exceeds the competent latitude of innuendo "to hold that the libel refers to any particular person," unless there is something in the libel that can be brought forward as applying to a particular person. *p. L. Neaves in Caldwell's case.*

The rule of construction applied by the Court in deciding whether the words complained of may reasonably bear the meaning put on them by the pursuer cannot be said to have been definitely fixed. In a recent case the L. P. Robertson laid it down that the Court must read the words "according to

Rule of construction of meaning of words.

“ the fair natural meaning of the words without speculating  
“ on what other people may happen to deduce from them.”

*Cook v. Gray*, 29 S.L.R. 247.

But this at first sight seems contrary to a *dictum* of L. Young, that the question is not what words mean, but what persons hearing them might reasonably believe the speaker to mean.

*M'Neill v. Forbes*, 10 R. 867.

The two *dicta* are, however, probably reconcilable, and amount to this proposition, viz., that the Court will read the words according to the fair natural meaning which would be given them by reasonable people hearing them uttered or reading them, and will not consider what persons setting themselves to work to deduce some unusual meaning might succeed in extracting from them. This undoubtedly is the rule of construction to be adopted by juries, and there is no reasonable ground for supposing that the Court should be guided by any other. It is the duty of the jury “to construe  
“ plain words by their plain and obvious meaning, and as  
“ any person reading them or hearing them in the common  
“ course of affairs would understand them.”

Duty of jury  
in construing  
words.

*Gibson v. Stevenson*, 3 Mur. 208.

“You are not to put any strained construction or far-  
“ fetched meaning on the words to draw them into a libel,  
“ but are to judge of them according to the sense of mankind.”  
*p. L. C. C. Adam.*

*Alexander v. Macdonald*, 4 Mur. 94.

It is also a rule for the jury that “if words are of doubtful  
“ meaning they ought to be taken in the mildest sense.”  
*p. L. C. C. Adam.*

*Hamilton v. Stevenson*, 3 Mur. 75.

But this rule probably does not apply when the Court is deciding whether action should be allowed on such words. In this case the Court will allow action to have it decided

by a jury whether in the circumstances "the mildest sense" cannot be attributed to them.

Innuendoes are therefore employed in three different circumstances :

Innuendoes employed in three circumstances.

(a) Innuendoes on words which are apparently innocent.

(b) Innuendoes on words which are capable of either a defamatory or an innocent meaning.

(c) Innuendoes to crystallise or focus admittedly defamatory expressions occurring among others which are not so.

Innuendoes of the first two kinds must be stated on record, as, when they are required, the relevancy of the action depends upon a defamatory meaning being put on the words complained of by the pursuer. But the third kind of innuendo, being a mere echo of the words used which are *per se* defamatory, can be inserted in the issue although not stated on record.

Must generally be stated on record.

*Wright v. Outram*, 16 R. 1004.

In setting forth on record the innuendo, the pursuer simply states that the words complained of have the defamatory meaning which he maintains they bear, and, in the case of innuendoes of the first kind, makes, as explained *supra*, a statement of facts and circumstances from which, if proved, the defamatory meaning may be inferred.

How innuendo stated on record.

*Inglis v. Inglis*, 4 M. 491.

In setting forth in the issue, the innuendo, the pursuer either inserts the words complained of in the issue itself, and follows them up by the words "meaning thereby that 'the pursuer is' . . . (stating the innuendo), or refers to them as being printed in an appendix to the issue, and then proceeds—"And whether the said publication (or words) or any "part thereof is of and concerning the pursuer, and falsely "and calumniously represents that he is" . . . (stating the innuendo).

How set forth in issue.

Alternative innuendoes are allowed in the same issue, pro-

Alternative innuendoes, when permissible.

vided that they are not mixed up, but are kept clear each of the other.

*McCulloch v. Litt*, 13 D. 334.

But if either of the alternative innuendoes does not amount to a meaning which renders the words defamatory, the issue is bad and cannot be allowed.

*MLaren v. Robertson*, 21 D. 183.

Examples of  
innuendo.

It now remains to give examples of imputations which have been innuendoed into a defamatory meaning, grouping them under the various heads of defamatory imputations already treated of.

I. Utterances  
innuendoed  
into imputa-  
tions against  
moral charac-  
ter.

I. Utterances which have been innuendoed into imputations against the moral character of the person complaining of them.

(a) Innudoes  
of crime.

(a) Such as have been innuendoed into a charge of committing a crime or offence.

Adulterating Food.

Defender had said that he "would probably have the "pursuer's premises examined, as, according to "the law, peace officers might by warrants "search baker's premises, and if any adulterated "food was found, the same might be seized and "disposed of." This was innuendoed, "meaning "thereby that the pursuer kept, in violation "of the law, adulterated bread or flour on his "premises."

*Broomfield v. Greig*, 6 M. 563.

Appropriation, dishonest, of other people's property.

A statement that the pursuer had failed to account for moneys collected by him, and that the defenders would report him to the Fiscal, was innuendoed that the pursuer had dishonestly appropriated moneys belonging to the defenders.

*Ramsay v. Maclay & Co.*, 18 R. 130.



Bankruptcy, fraudulent.

A statement that the pursuer had made a very bad failure, and had paid his creditors only 1s. 6d. in the £1, innuendoed as meaning that the pursuer had made a dishonest and dishonourable failure.

*Bruce v. Leisk*, 19 R. 482.

“Are you aware of the consequence under the Statute” (Debtor’s Act) “of lodging a state of affairs such “as you have done?” innuendoed “that pursuer “in lodging such state of affairs had been guilty “of a crime and offence under the provisions of “the Debtor’s (Scotland) Act 1880.”

*Scott v. Johnston*, 12 R. 1022.

“Will any man say that Mr. M. has a clear conscience, “having gone through the system that he has “done?” innuendoed that the pursuer had been guilty of fraudulent bankruptcy.

*Mathers v. Lawrie*, 12 D. 433.

Bloodshed.

A long wild letter in a newspaper expressing a desire to let out papist blood, was innuendoed as representing that the pursuer had written the letter and had therein incited to riot and bloodshed.

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

Breach of Trust (*see* Fraud).

Bribery.

A statement that the pursuer had offered a person £50 if he would not offer for a contract, was innuendoed that the pursuer was guilty of an attempt at bribery, or of other corrupt and improper conduct.

*Torrance v. Weddell*, 9 M. 243.

**Crime.**

To say that a man has very great claims to become a member of the society of Botany Bay, may be innuendoed that he has committed a crime.

*Macdonald v. M'Donald*, 17 F.C. 327.

**Fire-raising.**

A statement that the pursuer had refused admission to the police and to the fire brigade when a mill was on fire, was innuendoed that the pursuer "had endeavoured to prevent the fire at the "works referred to in the said article from being "subdued so as to cause destruction of the said "works and stock therein."

*Gudgeon v. Outram & Co.*, 16 R. 183.

**Forgery.**

The creditor in a promissory note wrote to the debtor saying that B, whose name appeared with the debtor's on the note, repudiated all knowledge of it. "I have therefore to inform you that unless "the full amount of the promissory note is now "paid to me before 11 o'clock to-morrow, I shall "consider it necessary to hand the note to the "Procurator-Fiscal," innuendoed that the pursuer, the debtor, had been guilty of forgery.

*Mackay v. M'Cankie*, 10 R. 537.

A bank agent, speaking of certain bills which had been presented to him by the pursuer to discount, said, "I am doubtful of their genuineness. . . . "I do not believe that S signed those bills." An innuendo was allowed that the pursuer had forged, or procured to be forged, the signatures of S appearing on the bills, and had uttered these as the genuine signatures of S. The defender in this case, speaking of the pursuer,

said, "He may have skedaddled," which was innuendoed that the pursuer having forged, or procured to be forged, the signatures of S on bills, and uttered them as genuine, had probably fled in order to escape a criminal prosecution. The defender had also spoken of the pursuer as a "fine fellow," and in the circumstances this was innuendoed as meaning that the pursuer had forged signatures to bills.

*Ingram v. Russell*, 20 R. 771.

On the other hand, when a minister, speaking of a letter signed "A member of E. Parish Kirk-Session," said, "I observe from the newspapers that some one purporting to be a member of session had written an anonymous letter to the editor, which I have no doubt is a forgery. . . . it bears internal evidence that it is a forgery, and that the editor has been imposed upon by a so-called member of session," an innuendo was refused, that the pursuer was the anonymous writer, and the so-called member of session to whom the defender was referring as having been guilty of forgery and imposition, Lord Neaves remarked, "I think it exceeds the competent latitude of innuendo to hold that the libel refers to any particular person unless there is something in the libel that can be brought forward as applying to a particular person."

*Caldwell v. Munro*, 10 M. 717.

#### Fraud.

Pursuer complained that the defender had stated that he (the defender) had repeatedly sold or disposed of game for, and on behalf of, the pursuer (who was a gamekeeper), and paid him the proceeds

thereof. This the pursuer innuendoed as meaning that he had taken game off the estate of X belonging to A, his employer, and had sold the same, and had appropriated the proceeds thereof to his own uses and purposes, and had thus been guilty of dishonesty, and of a breach of the trust reposed in him by his employer.

*Bertram v. Pace*, 12 R. 798.

"Now one of them has left the town. Any information as to his whereabouts will be thankfully received by a sorrowing landlord, the proprietor of the hall, who now concludes that a Tory Cleon is no more profitable as a tenant than a Socialist Boanerges," innuendoed as meaning that the pursuer had failed to pay his rent, and had gone away without leaving his address, to defraud the landlord of his claims.

*Godfrey v. Thomsons*, 17 R. 1108.

The defender wrote to Harbour Trustees to complain that overcharges were being made on tonnage and shipping dues, and said that the pursuers were making them. An innuendo was allowed that the pursuers had been guilty of fraudulent and unfair practices and of rapacity and extortion.

*Rodgers v. Macewen*, 10 D. 882.

#### Imposition.

The defender had protested notarially against the issuing of a certificate of proclamation of banns on the ground that the prospective husband was "in an infirm and facile state of mind, and that to such an extent as to affect his reason and judgment, whereby he is rendered unable to look after his affairs, and is liable to be imposed upon by designing parties; and, further, is not

“ in a fit condition of mind to enter into the state  
“ of marriage.” This was held actionable so far  
as it related to the husband without an innuendo.  
The wife was allowed action on it also, on an  
innuendo that the statement represented her “ as  
“ a designing party wishing to impose upon the  
“ other pursuer . . . by inducing him to enter  
“ into marriage with her, and as a person attempt-  
“ ing to force a marriage between herself and an  
“ individual in that condition ” (of mental weak-  
ness).

*Hendersons v. Henderson*, 17 D. 348.

Perjury.

The defender, in claiming his vote, had said it was  
rejected in the previous year through the culpable  
and wilful misstatement of the pursuer. Innuendo  
allowed that the pursuer was thereby represented  
to have committed perjury.

*Gray v. Walker*, 15 S. 1296.

Riot (see Bloodshed).

Sedition.

In the case of

*Lowe v. Taylor*, 7 D. 117,

an innuendo, practically only to crystallise the  
defamatory words actually used, was allowed,  
the issue being whether the pursuer was repre-  
sented as disloyal and stirring up the mob with  
revolutionary harangues.

Shebeening.

A statement was published that an old public-house  
was being conducted as a shebeen—in point of  
strict law—waiting the convenience of an ex-  
bailie and a town councillor, “ who are both about  
“ to become joint proprietors of the place ” when

a license has been secured. This was held not to justify an innuendo that the pursuers were committing a breach of the law in order that they might dishonourably and discredibly reap a personal benefit therefrom by purchasing the hotel when a license had been granted.

*Cook v. Gray*, 29 S.L.R. 247.

#### Swindling.

A statement that the pursuers "acted like thimble-riggers—heads I win, tails you lose"—was innuendoed "thereby accusing the pursuer of "being a cheat and swindler, and guilty of "criminal conduct."

*Drew v. Mackenzie*, 24 D. 649.

#### Theft.

A statement that a person "took" a thing requires an innuendo that the pursuer "had stolen it" to make it actionable.

*Moore v. Reid*, 20 R. 712.

Defender had stated that if the pursuer did not hand over an article to the defender, he (the defender) would place the matter in the hands of the Procurator-Fiscal. This was innuendoed as meaning that the pursuer had committed theft.

*Wilson v. Purvis*, 18 R. 72.

(b) Innuendoes of immorality not necessarily punishable.

(b) Such as have been innuendoed into a charge of immorality not necessarily punishable by law.

Adultery (see Indecency).

Deceit and untruthfulness.

Falsehood, a charge of uttering.

A statement that a vestryman had been expelled the "vestry as being unworthy of taking any part in "the business and councils of God's House," innuendoed that the pursuer had been guilty of

wilful falsehood, and as being from his conduct unfit to hold the office of a vestryman.

*Edwards v. Begbie*, 12 D. 1134.

A statement in a letter by the defender, "If I am  
" able to show that the statement made as regards  
" myself is a consummate lie, the other statements  
" in 'Milne's' letter may be put down in the  
" same category," was innuendoed that the pursuer had no regard for the truth and was a liar.

*Milne v. Walker*, 21 R. 155.

False statements, a charge of making.

The defender had written to the pursuer that the latter after having done a certain thing "voluntarily  
" assured" the defender that he had not done it.  
An innuendo that the defender thereby represented that the pursuer had wilfully made a false statement was refused.

*Kennedy v. Baillie*, 18 D. 138.

Pretences, charges of making false.

An article in a newspaper criticised a new atlas at some length. An issue was allowed whether the article represented that the pursuer and his firm had falsely and for the purpose of deceiving the public issued as the work of A. K. J. an atlas which was not the work of A. K. J. the first, or A. K. J. the second, but of persons not skilled in making an atlas.

*Johnstone v. Dilke*, 2 R. 836.

" You made your engagement under false pretences, you  
" advertise what you are not capable of performing,"  
innuendoed that the pursuer had wilfully deceived the defender, and had obtained an engagement from him under and by means of false pretences.

*Stuart v. Moss*, 13 R. 299.

Indecency and improper intercourse.

Adultery, a charge of.

“ Whether our client will resort to Doctors Commons  
 “ and eventually to Parliament upon a still  
 “ graver part of the cruel wrongs to which he  
 “ has been subjected by his wife, we are not  
 “ yet prepared to say,” innuendoed as representing that the pursuer (the wife) had been guilty of repeated adulteries.

*Ramsay v. Nairne*, 11 S. 1033.

Brothel, charge of keeping a.

A statement that the pursuer had not always been B.’s best friend in days past, and that the defender hoped B. would go to some place “ where drink  
 “ and your present companions won’t get near  
 “ you,” was complained of by the pursuer as meaning that she was the keeper “ of a house of  
 “ disreputable character where loose and immoral people were allowed to associate with  
 “ each other, and where B. would find drunken  
 “ and profligate companions, and would thereby  
 “ be exposed to temptation to do wrong.” The Court, however, refused the innuendo.

*Brydone v. Brechin*, 8 R. 697.

Carnal connection and fornication.

If it is said of a woman that she is “ a very improper  
 “ character,” “ an abominable woman,” and that a third party was “ too intimate ” with her, an innuendo is needed. But none is required if it be said of her that she had been on terms of criminal intercourse, or at least improper intimacy with a man, and had been found in bed with him.

*M’Culloch v. Litt*, 13 D. 334.

*Alexander v. Macleod*, 2 S.L.T. 123.



Immodest and indecent behaviour, charge of.

A statement that the pursuer had behaved shamefully and disgracefully to a girl, innuendoed that the pursuer had committed or connived at immoral conduct towards the girl.

*Jack v. Fleming*, 19 R. 1.

Street-walker, charge of being a.

Defender, whose pupil the pursuer was, had remonstrated with the pursuer for dressing gaudily and going about with young men, and had applied the term "street-walker" to her. The Court in the circumstances refused to allow this to be innuendoed into a charge that the pursuer was a prostitute.

*M'Neill v. Forbes*, 10 R. 867.

(c) Such as have been innuendoed into charges of misbehaviour in general, or of social offences.

(c) Innuendoes of general misbehaviour, and of social offences.

Betrayal of confidence and breach of trust.

The defender had stated that, being in a telegraph office where the pursuer was a clerk, he could give the words of a message which was being received. The pursuer was allowed to innuendo this as representing that he had committed a betrayal of confidence, and a violation or gross and culpable neglect of duty, by allowing to become known the import of a message which he, as clerk, was bound not to divulge.

*Richards v. Chisholm*, 22 D. 215.

Dishonesty, general charges of, and dishonourable conduct.

"This is the man who owes me money," said of a racing man in the paddock, was innuendoed that the pursuer owed the defender money on bet-

ting transactions, which he dishonestly refused to pay, and was a person who ought not to be allowed to remain in the ring or paddock.

*Blasquez v. Lothians Racing Club*, 16 R. 893.

A statement in a letter written about a man against whom decree had had to be taken for rent, that "I do believe that he would be mobbed if he "was appearing in the strath," was innuendoed as meaning that the pursuer was of "dishonour-able character."

*Macrae v. Sutherland*, 16 R. 476.

The defender had issued a circular to the effect that the pursuer, "who recently acted as agent for" the defender, had intimated that he had certain sacks belonging to the defender, which he would only give up on payment or exchange, and that the sacks must have come into the pursuer's possession by some irregularity. The pursuer was allowed to innuendo this as meaning that he having, without right or title, obtained a number of the defender's empty sacks, dishonestly retained said sacks, and dishonestly refused to give them up to the defender.

*Inglis v. Inglis*, 4 M. 491.

A statement that the pursuers had "put on the garb "of sturdy, bold, and unblushing repudiators," was innuendoed that the pursuer was guilty of gross dishonesty and breach of faith.

*Drew v. Mackenzie*, 24 D. 649.

A statement that a man wrote anonymous letters was innuendoed that he was guilty of treacherous and dishonourable conduct.

*Menzies v. Goodlet*, 13 S. 1136.

A statement that a person's presence at a certain club may be "irksome," may be innuendoed that the person is of such bad character as not to be a fit associate with honourable men.

*Macleod v. Marshall*, 18 R. 811; 28 S.L.R. 626.

"The fields betoken the presence of the sluggard, the stables bear traces of the most manifest indolence, carelessness, and recklessness," innuendoed as representing that the pursuer was a dishonest farmer.

*Dun v. Bain*, 4 R. 317.

A statement that a man had obtained a contract in a "mean and unfair manner," and had taken an "unfair advantage," was innuendoed that the pursuer had obtained the contract by dishonest and improper means.

*Waddell v. Roxburgh*, 31 S.L.R. 721.

Informer, to charge a person with being an.

The defender published a letter to him from the Revenue authorities, in which they asked the defender to show cause why proceedings should not be taken against him for having granted an unstamped receipt to the pursuer. This act was innuendoed as aiming at conveying the impression that the pursuer was a common informer, and a mean, dishonest and disreputable person.

*Kennedy v. Allan*, 10 D. 1293.

II. Utterances which have been innuendoed into imputations injurious to a person in his trade, occupation, business, profession, or office.

(a) Imputations that the pursuer was unfit or incapable for the post he held.

II. Utterances innuendoed into imputations against a man in his trade, profession, etc.  
(a) Innuendoes of unfitness.

A letter was published in a newspaper asking whether a particular school had passed lowest through the Government examination, and it continued, "Are the interests of the public to be sacrificed for the sake of providing a house and a salary for a teacher?" An innuendo was allowed "that the pursuer was unfit for his post as a teacher of a public school, and that it was the duty of the School Board in the interests of the ratepayers to dismiss him from it."

*M'Kerchar v. Cameron*, 19 R. 383.

In reviewing an atlas the critic said that it showed unmistakable signs of the absence of that "true geographical acumen" which Livingstone had lauded in the firm's work. An innuendo was allowed, whether the article falsely and calumniously represented that the pursuer and his present firm were no longer capable of producing good and useful atlases or geographical works.

*Johnstone v. Dilke*, 2 R. 836.

The defenders, on behalf of the council of a college, wrote a letter to one of the professors, and sent a copy to the secretary of the college, in which they referred to the unseemly disturbances which had arisen in the professor's class, and which had had a bad effect upon the credit of the college, and in which they suggested that the professor should retire. The pursuer, the professor, was allowed to innuendo the letter as meaning that he was incapable of discharging his duties in a proper and efficient manner, and was endangering the prosperity of the college.

*M'Bride v. Williams*, 7 M. 427.

(b) Imputations that the pursuer is neglecting his duties.

(b) Innuendoes of neglect of duty.

In

*Lowe v. Taylor*, 7 D. 117,

certain articles in a newspaper were complained of, among other things, because, the pursuer said, they represented him as neglecting his duties as a minister. The articles were put in issue, and the question for the jury was whether they bore that meaning.

(c) Imputations that the pursuer has acted in his post in a manner contrary to what society expects in a person in his position.

(c) Innuendoes of misconduct in office.

A statement that the pursuer (a sheriff officer), in pursuance of a scheme devised by another, executed as sheriff officer a pretended poinding and sale, and put an absurdly low valuation on the poinded goods, slumping them into a few lots to conceal what he had done, was innuendoed that the pursuer was a dishonest person, and unfit to hold the office of a sheriff officer.

*Richardson v. Wilson*, 7 R. 237.

An article in a newspaper was complained of which referred to one of the junior magistrates of the burgh as being in a mob; the pursuer, one of the bailies of the burgh, was allowed an innuendo that the article represented him as attempting to set law and the rights of property at defiance, and, although a magistrate of the burgh, as forming part of a mob collected for the purpose of violating the law, and illegally opposing and obstructing the protection of property, and the exercise of the rights of proprietorship.

*M'Douall v. Guthrie*, 15 D. 778.

A statement about a law agent that he carried on cases for the purpose of incurring expenses against poor people, and for the purpose of robbing poor people, and for the purpose of ruining poor people, was innuendoed as meaning that the pursuer in his professional capacity instigated and carried on law suits for the sole purpose of creating emolument to himself, and in wanton disregard of the interests of his clients, and of the loss and ruin which might thereby be entailed on them.

*M Rostie v. Ironside*, 12 D. 74.

A newspaper published certain statements, which the pursuer was allowed to innuendo as meaning that in his capacity as agent for the Bank of England, he had brought prosecutions for forgery for his own private advantage, and had induced one of the parties charged to confess on promising she should not be tried, and that he had subsequently had her tried for the crime.

*Gibson v. Stevenson*, 3 Mur. 208.

‘ He gives the money it is supposed, but whether “ he dispenses the whole of it or not is not “ known, as he has never proposed to publish a “ statement of how it is employed,” innuendoed that the pursuer “ is not a trustworthy trustee “ and administrator of a charitable bequest, and “ is a person capable of appropriating the “ funds of the bequest to his own uses and “ purposes.”

*Falconer v. Docherty*, 20 R. 765.

A statement: “ The Licensing Court had always “ been very amusing to him ” (the defender). “ He had appeared before that Court, both for

“ and against licenses, and they used to size up  
 “ the bench and say, ‘ Oh yes, this will be a day  
 “ for licenses, or it will be a day when none  
 “ will be granted,’ or they would say, ‘ Oh you  
 “ are right enough, you are a customer at Mr.  
 “ So and So’s bank, and he’s on the bench,’ or,  
 “ ‘ So and So has two clients on the bench, his  
 “ license is quite sure,’ ” was innuendoed as mean-  
 ing that the pursuers, who were bank agents and  
 J. P.’s, had each “ been unfaithful to the public  
 “ trust reposed in him as a J. P., and had  
 “ in his official position acted corruptly for  
 “ the personal benefit of the customers of his  
 “ bank.”

*Mitchell v. Grierson*, 21 R. 367.

(d) Imputations about a person’s business, trade, or pro- (d) Innuendoes  
 fession, or about the character of its productions, by which it of direct injury  
 is directly injured. to business.

(a) General statements about a person’s business, etc., by (a) Innuendoes  
 which it is directly injured. of general  
 injurious state-  
 ments.

“ I have been in many—indeed in most—hotels  
 “ in Scotland, but nowhere have I encountered  
 “ so much drinking, or so much squalid untidi-  
 “ ness and dirt,” was innuendoed “ that the  
 “ pursuer kept his hotel in a state of squalid  
 “ untidiness and dirt, and permitted persons to  
 “ drink therein to excess, all to such a degree as  
 “ to distinguish it in these respects from most  
 “ of the hotels in Scotland, and to cause dis-  
 “ comfort and annoyance to the visitors, and to  
 “ the residents in the said hotel.”

*McIver v. McNeill*, 11 M. 777.

(β) Imputations against a person’s solvency or financial (β) Innuendoes  
 position. of financial  
 difficulties.

Defender had said that the pursuer was not worth £10, that he was a person totally devoid of credit, and that no one in the country would give him credit for that amount. The pursuer proposed to innuendo this as meaning that he "was a person in insolvent circumstances, or a person to whom no credit could be given," but the innuendo was refused by the Court on the ground that the alternative in the innuendo was bad, because it merely suggested that the defender had said the pursuer was poor, and it is not defamatory to say another is poor.

*M'Laren v. Robertson*, 21 D. 183.



## CHAPTER XV

### ABSOLUTE PRIVILEGE

Privilege—what?—Of two kinds—I. Absolute privilege: (a) of circumstances; (b) of truth—II. Qualified privilege: (a) of position; (b) of relationship; (c) of subject matter—I. (a) Absolute privilege of circumstances grounded on public policy: its effect—Attaches to (1) members of Parliament; (2) Petitions to Parliament; (3) Judges, counsel, witnesses, and jurymen; (a) judges—Absolute privilege of judges on cases competently before them—Applies to Supreme Court judges—Sheriff Courts—Justices of the Peace—Church Courts—General Assembly—Presbyteries—Kirk Sessions—Ministers—Courts of dissenting churches—Other voluntary tribunals—Arbiters—Naval and Military Courts—Judge not privileged when speaking without his jurisdiction—Difference between absolute privilege of members of Parliament and judges—Distinction in England between privilege of judges of Courts of Record and others—(b) Counsel, law agent making statements on record; (c) Witnesses; (d) Jurymen—(4) Certain reports—(a) Reports printed by order of Parliament; (b) Accurate reports of parliamentary proceedings, and those in Courts—Parliamentary reports—Reports of proceedings in law-courts—Reports of proceedings in the General Assembly—Reports of proceedings in Courts of dissenting churches—No room for averment of malice in complaining of reports of Parliamentary proceedings, etc.—Reports of contents of certain public documents—What public documents are absolutely privileged—(5) Possibly the Lord Advocate.

IN certain cases a man is entitled to utter what is defamatory of another. In these cases the utterer is said to be privileged. Privilege—what?

Privilege is of two kinds. I. Absolute. II. Qualified. Of two kinds.

I. Absolute privilege is of two kinds: (a) the privilege of persons in certain places and positions to speak absolutely freely—this may be called the absolute privilege of circumstances; (b) the privilege of all persons to speak what is true. I. Absolute privilege. (a) Of circumstances. (b) Of truth.

II. Qualified privilege.  
 (a) Of position.  
 (b) Of relationship.  
 (c) Of subject matter.

II. Qualified privilege arises in three different ways: (a) when the position of the party uttering the defamatory imputation is such as to entitle him to speak freely on the matter; (b) when the relationship of the party uttering, and the party complaining, is such as to justify the person uttering the imputation in speaking freely; (c) when the nature of the utterance is such that the law holds the party uttering it entitled to do so, though its effect may be injurious to others.

I. (a) Absolute privilege of circumstances.

Grounded on public policy.

Its effect.

I. ABSOLUTE PRIVILEGE. (a) The absolute privilege of persons in certain places and positions to speak absolutely freely. This has hitherto monopolised the term absolute privilege, but it is no more absolute than the privilege people enjoy of speaking the truth. It is grounded on public policy, and it permits persons in specified positions or places to speak absolutely freely, although their statements may be both defamatory and untrue. The effect of this kind of absolute privilege is to protect persons in the specified positions and places from any enquiry in the law-courts as to whether what they have said in those positions and places was or was not defamatory. In consequence, if a party complain of any utterance of a person in one of these specified positions or places, the Court will refuse to allow him to proceed with his action.

Attaches to (1) Members of Parliament.

This privilege attaches—

(1) To members of Parliament with respect to anything said in Parliament.

#### *Bill of Right.*

But not with respect to anything said by a member outside of Parliament, or to a copy of a speech delivered in Parliament but circulated outside.

*Rex v. Abingdon*, 1 Esp. 226; 5 R.R. 733.

*Rex v. Creevey*, 1 M. & S. 273; 14 R.R. 427.

It now is decided, however, that a correct and impartial

report of a speech made in Parliament is privileged, but, unless its correctness and impartiality are admitted by the pursuer, the Court cannot, as in other cases of absolute privilege of this kind, hold the report privileged until its correctness and impartiality are established.

*Wason v. Walter*, L.R. 4 Q.B. 73.

(2) To all petitions to Parliament or to any committee thereof. (2) Petitions to Parliament.

*Lake v. King*, 1 Mod. 58.

*Kane v. Mulvany*, Ir. R. 2 C.L. 402.

(3) To judges, counsel, witnesses, and jurymen for anything uttered by them in Court. "The authorities establish beyond all question this; that neither party, witness, counsel, jury, nor judge can be put to answer civilly or criminally for words spoken in office; that no action of libel or slander lies whether against judges, counsel, witnesses, or parties for words written or spoken in the course of any proceeding before any Court recognised by law, and this, though the words written or spoken were written or spoken maliciously without any justification or excuse, and from personal ill-will and anger against the person defamed." *p. Lopes*, L. J. (3) Judges counsel, witnesses, and jurymen.

*Royal Aquarium v. Parkinson*, L.R. 1892, 1 Q.B. 431.

This *dictum* of Lord Justice Lopes, in so far as it includes parties, goes beyond the rule of the Scots law. For the rest it is applicable.

(a) Judges. The immunity of judges from liability in actions against them for words spoken when acting as such has been long recognised, though the recognition of its absoluteness is more recent. In (a) Judges.

*Gibb v. Scott*, Elchies Decisions, Public Officer 9, it was held that a judge ought not to be punishable for his sentence, however injurious it be, unless from circumstances it appear to have proceeded from partiality or favour; and

therefore where the private party who had obtained the sentence was found liable in expenses and damages because of the iniquity of the prosecution, yet the judges (Justices of the Peace of good character) were acquitted. Since that case, the drift of decisions on the matter seems to be :—

*First.* That all classes of judges are absolutely privileged in what they say relative to the case which is before them, and which they have jurisdiction to entertain, although their remarks are irrelevant.

*Second.* That a judge cannot take advantage of being in Court to utter what has no bearing on the case before him, or to assume a jurisdiction which he does not possess, and in the pretended exercise of it to utter defamatory statements.

Absolute privilege of judges' remarks on cases competently before them.

*First.* The proposition that judges are absolutely privileged in what they say, relative to a case which is before them, and which they have jurisdiction to entertain, though their remarks be entirely irrelevant, was established by the case of

*Haggart's Trs. v. Hope*, 1 S. 46, 2 S. Apps. 125.

Applies to Supreme Court judges.

This was an action by a counsel against a judge of the Supreme Court, for remarks made by the latter on the former's conduct in a case which was being heard by the judge. It was held both in the Court of Session and in the House of Lords that no action would lie against a judge for words uttered in such circumstances. That the rule applies to sheriffs in the Sheriff Courts is evidenced by

Sheriff Courts.

*Hamilton v. Anderson*, 18 D. 1003, (H. of L.) 3 MacQ. 363, *Harvey v. Dyce*, 4 R. 265 ;

Justices of the Peace.

and the judgments both in the Court of Session and the House of Lords in

*Robertson v. Boswell*, 6 S. 242, 7 S. 601 ; 4 W. & S. 102, *Olipphant v. M'Nicol*, 5 B.S. 573,

show plainly that the same rule applies to Justices of the

Peace. But it must be observed that in England a committee of a County Council for licensing Music Halls was held not to be a Court entitled to absolute privilege.

*Royal Aquarium Co. v. Parkinson*, L.R. 1892, 1 Q.B. 431.

Its applicability to Church Courts is no less clear. An Church Courts. apparent indecisiveness in the judgments relative to them is to be accounted for by the peculiar and narrow nature of their jurisdictions. It is sometimes impossible without enquiry to decide whether the words complained of were uttered by the Church Court or one of its members in a proceeding properly within its purview or not. If, however, they were, the members of a Church Court enjoy the same absolute privilege which is accorded to the judges of the Civil Courts. Thus it was decided in

*Porteous v. Izat*, M. 13937,

that a person is not liable for any expressions used by him in the General Assembly of the Church of Scotland relative to the question before it, and suggested by the evidence under consideration. General Assembly.

Again it was decided that, as Presbyteries had by statute the power to serve a libel on a parochial schoolmaster, and to depose him if they found him guilty, they were absolutely privileged in acting under the statute, and that no action would lie against them even although their decree might be afterwards reduced. Presbyteries.

*Dunbar v. Presbytery of Auchterarder*, 12 D. 284.

Several decisions have been given exemplifying the rule in its application to Kirk Sessions. In Kirk Session.

*Robertson v. Preston*, M. 7465 & 7468,

it was held that a Kirk Session cannot be sued for what it has done, as such, though the individuals composing it may be liable for what they have done as individuals, and not as members of Session. This view was affirmed in

*McDougal v. Campbell*, 6 S. 742.

*Sturrock v. Greig*, 11 D. 1220.

But Church Courts, when acting in their capacity as prosecutors, do not enjoy absolute privilege.

*Smith v. Presbytery of Auchterarder*, 12 D. 296.

Ministers.

A minister is privileged in refusing to give the ordinances of religion, and in giving reasons for so doing, either to the Church Courts or in private admonition to the parties themselves.

*MacQueens v. Grant*, M. 7466, 7468.

And a minister promulgating regularly a decree of the Kirk Session from the pulpit is absolutely protected. *p. L. Meadowbank*.

*Adam v. Allan*, 3 D. 1058.

Though this is true of an Established Church minister, *L. Meadowbank's* statement that there is no difference in a dissenting church must not be fully accepted. If, by the constitution of a dissenting church, its members agree that decrees of their Courts shall be publicly announced, such decrees when so announced, if they affect members only, will be absolutely protected, but unless such right to publish is given, or if the decree defames any one who is not a member of the church, the absolute privilege will not exist.

Courts of dissenting churches.

The rule also applies to the Church Courts of dissenting churches, but is narrower in its application. The rights, powers, and duties of the Courts of the Established Church are matters publicly known, and when an action for defamation uttered by or in them is brought, the Civil Court to some extent can judge without enquiry whether the matter complained of was or was not lawfully within the purview of the Church Court. In the case of dissenting churches, however, the rights of their Courts can (1) never extend over persons not in the church of the Court complained

of, and (2) not even extend over persons in that church unless, by the terms of the constitution of the church, the Court is given a right to exercise jurisdiction in the matter in the discussion of which the alleged defamatory imputation was uttered. The Civil Court therefore, before it upholds the absolute privilege of a dissenting church Court or its members to utter the matter complained of, must be satisfied (1) that the complainer is a member of the church whose Court's actions he complains of, and (2) that the subject in the discussion of which the alleged defamatory matter was uttered, was properly cognisable and regularly considered by the Court in terms of the constitution of the church, and that the matter itself was relevant or pertinent to the subject under discussion. The reason of this is that dissenting churches are purely voluntary institutions. They therefore cannot affect others than those who enter them. Those, too, who enter them, do so contractually, and their rights and liabilities are regulated by the terms of the contract which is the constitution of the church. Thus it was held that a dissenting church Presbytery is liable in an action, if it is averred that though pretending to act judicially according to its constitution, it did not do so.

*Auchincloss v. Black*, Hume 595.

But a dissenting Kirk Session passing a decree of suspension for contumacy against one of its members—a matter within its proper scope—is absolutely privileged.

*Thallon v. Kinninmont*, 18 D. 27.

The case of

*Brownlee v. Kirk Session of Carluke*, Hume 596,

*Edwards v. Begbie*, 12 D. 1134,

is not opposed to the rule as stated. In that case the Court allowed an action against an Episcopal vestry and minister for having pronounced a sentence of expulsion against one of the vestrymen, but the vestryman who sued set forth on record

a reversal by the bishop of the vestry's decision on the ground that certain notices required by the constitution of the chapel had not been given to the pursuer, or, in other words, that the vestry had not acted in terms of the constitution binding on it and the pursuer. The opinions, too, in

*M'Millan v. Free Church*, 24 D. 1202,

cannot be said to be against the view that within the limits above laid down the Courts of dissenting churches are absolutely privileged.

Other volun-  
tary tribunals.

There is no reason to doubt that the absolute privilege of judges acting within their jurisdiction, applies not only to Church Courts of dissenting churches, but also to any individual or body of individuals who, by contract, have had conferred on him or them, judicial or *quasi* judicial powers. This absolute privilege is subject to the same limitations as apply to the Courts of dissenting churches, viz. (1) that it only protects him or them from actions by those who have contracted to subject themselves to the judicial decision of the individual or body of individuals, and (2) that it only protects him or them when exercising jurisdiction over a person who has agreed to be subject to the jurisdiction when the individual or body of individuals are regularly exercising that jurisdiction, and in making remarks pertinent to the exercise of it. Two cases bear out this proposition. The pursuer and defender were both members of a religious society, the members of which were taken bound to report to the society any misbehaviour of any of its members. The defender reported the pursuer, and the latter's conduct was inquired into by the society. It was held that the defender was not liable for reporting to the society, but was liable for defamatory statements made about the pursuer to third parties.

*Grieve v. Smith*, Hume 637.

Arbiters.

Again, the pursuer was employed by one of the parties to a submission to act for that party, and did so, thereby placing



himself under the jurisdiction of the arbiters. The latter having disapproved of the conduct of the pursuer, thought it desirable to refer to it in presence of the parties, and therefore having summoned them, the defender, one of the arbiters, told the party for whom the pursuer appeared that the latter was a villain. The defender pleaded that an arbiter criticising as arbiter the conduct in the case of those appearing before him enjoyed the privilege of a judge, and the Court assolized the defender.

*Cochran v. Watson*, Borth. 456.

The absolute privilege of judges applies to those in military and naval Courts.

Naval and  
military  
Courts.

*Dawkins v. L. Rokeby*, L.R. 7 H.L. 744.

*Second.* Although it is clear that a judge, or one in the position of a judge, is absolutely privileged, when exercising his jurisdiction, in perfectly freely commenting on all that relates in any way to the question before him, it is equally clear that the judge has no privilege outside his jurisdiction. This fact was clearly pointed out in the opinions of the judges in the Court of Session in

Judge not  
privileged  
when speaking  
outwith his  
jurisdiction.

*Hamilton v. Anderson*, 18 D. 1003,

and more particularly in that of Lord Cowan.

In this respect there seems to be a real difference in degree between the absolute privilege of a member speaking in Parliament and that of a judge. The former can say anything he likes about any person on any occasion in Parliament, and the only control to which he is subjected is that of the House to which he belongs. However unnecessary, however irrelevant his remark may be, it will found no action for defamation. But the absolute privilege of judges, or those in the position of judges, only attaches to them when (1) they are dealing with a matter within their jurisdiction, and (2) they are speaking relative to the matter within their jurisdiction. An idea seems to have occurred to some judges

Difference be-  
tween absolute  
privilege of  
members of  
Parliament  
and judges.

Distinction in  
England be-  
tween judges  
of Courts of  
Record and  
others.

that a higher degree of privilege attaches to judges of the Superior Courts than to those of the Inferior. In England a distinction is drawn between the judges of Courts of Record and those of Courts which are not of Record. This distinction seems fallacious. The judges of all Courts alike seem entitled to absolute privilege for their utterances under the two conditions above specified. The probable reason for the supposed distinction between Superior and Inferior Court judges in this respect lies in the two facts (1) that Superior Court judges have a wider jurisdiction than those of Inferior Courts, and can therefore competently adjudicate on a much larger variety of causes, and (2) that Superior Court judges, both from their position and training, are much less likely than those of Inferior Courts to use their office for uttering matter not relative to the questions before them. But suppose a Supreme Civil Court judge, having no jurisdiction to try criminal charges, took on himself to try a person for crime, can it be for a moment supposed that he would not be liable for anything defamatory which he uttered when doing so? Or suppose a Supreme Court judge, when hearing a case, stopped the proceedings and made a defamatory remark not relative to the case, can it for a moment be believed that he would be sheltered by the absolute privilege of a judge? In such cases no privilege would protect the man because he happened to be a judge. This proposition seems clearly established by the opinions given in

*Robertson v. Boswell*, 6 S. 242; 4 Mur. 509, 7 S. 601; and  
4 W. & S. 102;

and more particularly by that of the L. J. C. Boyle 7 S. 604. In that case the defenders, Justices of the Peace, had been applied to by the pursuer to mitigate the punishment which he had incurred for poaching. In refusing the application, one of the defenders said that the pursuer was not only a poacher, but a thief, that he had stolen bee-hives, and that

the other defender knew this was true. It is obvious that such an ultroneous statement, founded on nothing that had occurred in the case, quite impertinent to it, and merely the expression of a personal belief, not even matter of common talk; could not be uttered by a judge under the shelter of his privilege. Again it was laid down that a sheriff will be liable in damages if he acts in a plainly irregular way, as by granting a warrant to sequester goods on a mere assertion by persons that the owner of the goods is indebted to them.

*Anderson v. Home*, M. 13949.

Similar judgments have been given relative to the Church Courts and their members. In

*Sturrock v. Greig*, 11 D. 1220,

while it was laid down that an Established Church Court is absolutely privileged in pronouncing sentence in a proper case of discipline duly brought before it, regularly conducted, and within its competency as a Church Court, even though it be averred that the sentence or judgment was pronounced maliciously and without probable cause, it was also held that such a Court would not be privileged if the sentence or judgment went beyond its jurisdiction, or if it refused to exercise jurisdiction conferred on it by law. It will not, however, be liable for defamatory matter in a petition presented by it to the General Assembly on a matter which may come under its proper cognisance. It was consequently held in that case that a Kirk Session was not privileged in causing its minister to reiterate from the pulpit charges of which it had found a man guilty, after its judgment had been reversed both by the Presbytery and Synod; for it was then not acting within its competency as a Church Court. And it was also held that it was not privileged in giving as a ground for refusing to nominate scholars to a mortification that the schoolmaster was unfit for and neglected his duties. In

doing this it was not acting as a Church Court at all. A somewhat doubtful decision was given in

*M'Dougall v. Campbell*, 6 S. 742, 3 F.D. 787,

where the pursuer having applied to his Kirk Session for a certificate of character on his approaching marriage, the defender in the Session said the pursuer was a thief. The Court allowed an action to proceed against the defender, after the pursuer had put in a condescendence averring previous ill-will towards him on the part of the defender, and repetitions, outside of the Session, of the charge. But the L. J. C. Boyle then fully admitted (6 S. 744) the absolute privilege enjoyed by members of Kirk Session when acting within their jurisdiction and speaking relative to the matter under consideration. The case of

*Edwards v. Begbie*, 12 D. 1134,

is quite illustrative of the rule under discussion, for there an action was allowed against a dissenting church Court which in the exercise of its jurisdiction had obviously acted irregularly.

(b) Counsel.

(b) Counsel enjoy an absolute privilege in speaking in Court of the case they are pleading. Thus it was early laid down that counsel pleading at the bar have a right to comment with freedom upon depositions as well as upon every part of the evidence and upon the conduct of the parties against whom they are pleading in all matters pertinent to the cause.

*Moodie v. Henderson*, M. 360.

"In the case of counsel . . . you may make use of "injurious expressions, the express tendency of which is to "infer malice, but the Court has found that the whole "presumption of law is removed." *p. L. Balgray.*

*Forteith v. Fife*, 20 F.C. 8.

This privilege of counsel has only been asserted in Scotland in one case and that relative to a law agent pleading before a Licensing Court.

*Williamson v. Umphray*, 17 R. 905.

In another, which is badly reported, the defender, an agent, sued for a statement made by him in the Sheriff Court, seems only to have claimed a qualified and not an absolute privilege.

*Stewart v. Kyd*, 7 S.L.R. 577.

But there is no doubt that counsel, whether they be advocates, law agents, or the parties themselves, are privileged absolutely in what they say relative to a case in which they are pleading.

*Munster v. Lamb*, L.R. 11 Q.B. D. 588.

The privilege of a law agent in making statements on record is only in certain cases absolute. "An agent is not responsible for the truth of the statements made to him by his client, and great latitude must be allowed to an agent in conducting the cause of a client. He is not entitled to invent any facts for his client, but if the client positively instructed him to make a statement, the agent does not become responsible for being the medium through which the client's statement is made." *p. L. P. Hope*.

Law agent making statements on record.

*Ramsay v. Nairne*, 11 S. 1033.

This is a more accurate statement of the law than in the earlier case of

*Yeats v. Ramsay*, 4 S. 275,

where it was held that an agent is not absolutely privileged in the statements he makes on record, and if therefore the pursuer offers to prove they are maliciously made, the action will not be thrown out, even although the defender pleaded that the statements were made by him as an agent in judicial proceedings in discharge of his professional duty, and that he was prepared to retract the statement if untrue. This statement is not so accurate as that in *Ramsay v. Nairne*, because an agent's liability will not depend upon his malice, but upon whether the matter complained of was inserted with or without instructions from his client. Thus in

*Johnston v. Scott*, 7 S. 234,

it was held that a law agent is not responsible for false statements communicated to him by his client, inserted in a document to be put before the Court, and pertinent to the cause. But where the agent has himself composed the record an action is maintainable against him.

*Manson v. Macara*, 2 D. 208.

And so also if an agent write a libellous letter in excess of his instructions.

*Wilson v. Purvis*, 18 R. 72.

The distinction between the absolute privilege enjoyed by counsel in pleading, and the lesser protection afforded to agents in a cause, is inferentially brought out in the case of

*Bayne v. Macgregor*, 1 M. 615.

There the pursuer complained that the defender, an agent, had maliciously instructed his counsel in a case to utter certain defamatory statements of the pursuer. No action seems to have been raised against the counsel, but the case against the agent went to trial.

An agent, however, appears to enjoy an absolute privilege in another direction. It would seem that what he writes to his client is absolutely privileged, though the person defamed avers malice and ill-will, if the letters were confidential and were divulged by mistake or breach of confidence.

*Stewart v. Swinton*, 4 S. (N.E.) 35, 21 F.C. 789.

(c) Witnesses.

(c) Witnesses. What a person says when examined as a witness against himself is absolutely privileged.

*Mackintosh v. Weir*, 2 R. 877.

But though this be so, it is doubtful how far in the case of an ordinary witness, not a party to the cause, the protection of absolute privilege is given to anything said in the witness-box, and relative to the case. In England it would appear that a witness is absolutely privileged, whether he be a party or not, in what he says in the witness-box.

*Dawkins v. Lord Rokeby*, L.R. 7 H.L. 744.

But in Scotland a case was allowed to go to trial based on statements made by a witness in a military Court of Inquiry, and the question of whether such statements were absolutely privileged never seems to have been discussed.

*Rogers v. Dick*, 1 M. 411.

It is probable, however, that when a case arises it will be held by our Courts that all statements made by witnesses and relative to the subject of the action or persons in any way concerned with or referred to in the case, will be held absolutely privileged. On the other hand, witnesses will probably not be allowed to take advantage of being in the box for the purpose of referring to some one not in the least connected with the case, and reference to whom can have no possible bearing on the case, to defame him. Thus, if a witness in an action, say of divorce, between H and his wife, with which B, the witness's employer, had nothing to do, volunteered the statement that B was a thief, it is difficult to believe that the witness would be protected by absolute privilege from an action at the instance of B.

(d) Jurymen. No instance is recorded in the Scots (d) Jurymen. authorities of a jurymen being sued for any statement made by him when acting as a jurymen. There is no doubt, however, that Lord Justice Lopes' *dictum*, cited *supra*, applies in Scotland, and that a jurymen will be absolutely privileged in what he says when acting as a jurymen, relative to the matter being tried, and regarding the persons referred to in the case.

(4) To certain reports. Certain kinds of reports are absolutely privileged, and though they contain matter both defamatory and untrue, no damages can be obtained by persons injured by their publication. Reports thus protected are of two kinds: (a) reports printed by order of either House of Parliament; and (b) accurate and impartial reports contemporaneously published of proceedings in

(4) Certain reports.

Parliament and in the public Courts of the country, and copies of certain official deeds and documents open to the public.

(a) Reports printed by order of Parliament.

(a) Reports printed and published by order of either House of Parliament are absolutely privileged on production of a certificate from an officer of the House that the reports are so printed and published.

3 & 4 *Vict.* c. 9, s. 1.

(b) Accurate reports of Parliament, law courts, etc.

(b) The absolute privilege enjoyed by the publisher of a contemporaneous report of proceedings in Parliament, or in a public Court, and of copies of certain official deeds and documents open to the public, only arises—unless the pursuer admits the correctness and impartiality of the report, or the accuracy of the reprint—on proof of the accuracy and impartiality of the one and the correctness of the other. But on these being established the privilege is absolute and is a complete protection against liability.

This was decided with regard to reports of proceedings in Parliament by the case of

*Wason v. Walter*, L.R. 4 Q.B. 73.

Parliamentary reports.

There is some suggestion in the judgments in that case that the privilege is lost if the publication of the report is not to give the public information, but merely to injure a person mentioned in the report. The law in England with regard to the publication of reports of judicial proceedings certainly required that there shall be want of malice in the publication.

*Stevens v. Sampson*, L.R. 5 Ex. 53.

But by the Law of Libel Amendment Act 1888, 51 & 52 *Vict.* c. 64, which does not apply to Scotland, an absolute privilege appears to be granted to contemporaneous reports of this kind. If in Scotland the privilege accorded to these classes of reports is not absolute (and the point seems never to have been definitely settled), this is not the place to treat



the question. But it is submitted that by our law, a fair and accurate report contemporaneously published of proceedings either in Parliament or in a public Court is privileged absolutely, and that the Court will not inquire into the intention of the publisher. This, so far as a report of judicial proceedings is concerned, is the statement of the law by L. Ivory in

Reports of  
proceedings in  
law courts.

*Drew v. Mackenzie*, 24 D. 649.

*p. L. Kyllachy.—Wright v. Outram*, 16 R. 1004.

And the Second Division appear to have agreed with L. Kyllachy's view in the latter case. It was also treated by the judges as law in

*Macleod v. Justices of the Peace of Lewis*, 20 R. 218, that a fair and accurate report of proceedings taking place in open Court was privileged. The privilege only attaches, however, to a report of what is said or read in Court, and not to the publication of any document which, though put into the process, is not read. The publication, therefore, of an open record which has not been read in Court is not privileged.

*Richardson v. Wilson*, 7 R. 237.

Nor, it seems, is that of a closed record which has not been read.

*Macleod v. Justices of the Peace of Lewis*, 20 R. 218.

The principle of these decisions is that, as the public have right of access to the Court, they are entitled, if they cannot be present, to know what they would have learned, had they been there, and a person merely publishing a fair report of what goes on, is not to be liable for doing so. But, on the other hand, when the public go to a Court they do not get access to the documents except to the extent they are read; and a report, therefore, should not contain what the public in Court do not hear. The report must be fair, impartial, and accurate. If it accurately reports one part of the pro-

ceedings, and omits another which gives a different colour to the whole case, it will not be privileged.

*Wright v. Outram*, 17 R. 596.

But it need not be *verbatim* so long as it gives an accurate impression of the course of proceedings.

*p. Campbell, C. J.—Andrews v. Chapman*, 3 C. and K. 286.

Reports of proceedings in the General Assembly.

The absolute privilege of a fair and accurate report was denied to that of proceedings in the General Assembly of the Church of Scotland.

*Porteous v. Izat*, M. 13937.

It seems doubtful whether this decision is good. It is submitted that a fair and accurate report of a proceeding competent and regularly brought before the General Assembly or any Church Court of the Established Church, will enjoy absolute privilege if the meeting of the Assembly or Church Court were open to the public. The possession of absolute privilege would not, however, be afforded to a report of a Court of a dissenting church. See 4th issue in

Reports of proceedings of Courts of dissenting churches.

*Edwards v. Begbie*, 12 D. 1134.

No room for an averment of malice in complaining of reports of proceedings in Parliament, etc.

A person complaining of a report of proceedings in Parliament, or in a public Court of the country, does not need to aver and prove that the statements were maliciously published. If the report complained of is fair and accurate—and that the publisher must establish—it is absolutely privileged if it has been published timeously after the proceedings took place of which it is a report. Being absolutely privileged, the question of whether it was maliciously published cannot arise. On the other hand, if it is not a fair and accurate report, it enjoys no privilege at all, and the law presumes that its publication was malicious.

*Wright v. Outram*, 16 R. 1004.

It may be, however, that if a fair and accurate report of

proceedings in Parliament or in a Law Court was published not timeously, a person complaining of it would be allowed to recover damages on proving that its publication was malicious. In other words, though the report would have lost absolute privilege, it might still be entitled to qualified privilege.

A person is absolutely privileged in publishing copies of certain official deeds and documents, such as the decrees of Courts and the contents of public registers open to the public. The basis of this privilege is the same as that which protects fair and accurate reports of proceedings in Court, namely, that what the public can learn, each one for himself, it can learn through a medium. It must, however, be remembered that this privilege of publishing copies of official deeds and documents only applies to copies of those which are themselves absolutely privileged. An official document, therefore, of a subordinate governing body, such as a town council, not being itself absolutely privileged, could not entitle a party publishing it to absolute privilege. The deeds and documents, therefore, which will entitle a person publishing them to absolute privilege, are probably limited to such as are obtainable by the public, and are either (1) Parliamentary reports, (2) official documents connected with legal proceedings, and (3) possibly public orders issued by the higher departments of the central Government. The cases in Scotland have all been actions founded on the publication of official documents connected with legal proceedings. Thus, it was decided that there was absolute privilege to the publishers of copies of the entries in the Register of Protests of Bills in the case of

Privileged  
public docu-  
ments.

What public  
documents are  
absolutely  
privileged.

*Newton v. Fleming*, 8 D. 677 ; reversed, 6 Bell's  
App. 175.

In

*Outram v. Reid*, 14 D. 577,

the Court had no doubt of the right of a newspaper to publish a list of bankrupts taken from the *Gazette*, and of the immunity from action of a newspaper if it printed the list accurately. A black list, containing the names of those against whom decrees in absence have been obtained, is absolutely privileged.

*Taylor v. Rutherford*, 15 R. 608.

But the privilege is lost if anything be added to the list, which renders it more than a mere statement of the fact that decrees have been obtained against the parties named. Thus, when it was stated in a black list that perhaps some of the parties mentioned in it might have credit given them, the privilege of the mere list was lost.

*Andrews v. Drummond*, 14 R. 568.

And the black list must be scrupulously accurate. Thus where decree had only been obtained for expenses in a small debt case, and the black list stated that the decree was for the sum sued for, the publishers were held liable.

*Rarity v. Stubbs*, 1 S.L.T. 74.

On the same ground as a black list is privileged, a list of convictions obtained against persons is absolutely protected if it be the mere statement accurately made of the convictions.

*Buchan v. North British Railway*, 21 R. 379.

Possibly the  
Lord Advocate.

(5) It has been said as an *obiter dictum* that the Lord Advocate is absolutely privileged in what he does in discharge of his duties. *p. L. Young*.

*McMurchy v. Campbell*, 14 R. 725.

Although there is no decision to support this statement, not only the eminence of the judge who made it, but the whole tendency of the law to protect high officials are reasons for holding it to be accurate. It must, however, be noticed that if this privilege exists, it is not possessed by the inferior

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officials, such as Procurators-Fiscal, although they enjoy a qualified privilege which gives them very ample protection. But the privilege of the Lord Advocate, if it is absolute, will probably be possessed also by the Advocates-Depute, who are his representatives.

## CHAPTER XVI

### VERITAS

*Veritas excusat*—In early times otherwise—If *veritas* appear on pursuer's record, Court will hold action irrelevant—If not, defender must specify facts on which plea rests—Competent to prove truth of part of libel—Relaxations on rule requiring specification—Opinion of pursuer's superiors that defamatory matter untrue no bar to defender pleading *veritas*—Existence of reports to same effect as defamatory matter no justification—Defender can deny having uttered statement and still plead *veritas*—*Veritas* may be pleaded after issue is adjusted—To prove *veritas* counter issue must be taken—No proof of *veritas* without counter issue—No diligence to prove *veritas* unless counter issue has been taken—*Veritas* in holding up to public hatred, etc.

*Veritas excusat.*

(b) *Veritas convicii.* A person is absolutely privileged in saying what is true. *Veritas* is not usually considered as a plea of privilege, but it really is one. A statement is no less defamatory because it is true. It injures character, but the truth of it entitles the person to make it; in other words, he is privileged by the truth. The universal applicability of the rule that truth excuses has been sometimes questioned, even in recent times. *p. L. Deas*, p. 551, in

*Friend v. Skelton*, 17 D. 548.

But no reported decision can be referred to justifying the doubt. It is said that the mere wanton and malicious reiteration of a truth is a *convicium*, something different from a slander or libel, and that a person will not be protected if he persistently, wantonly, and unnecessarily reiterates something which is true about another, merely to render the

latter's life unbearable. Whatever may be the public opinion on a person who acts so unamiably, there is no law to punish him for doing so, and it would be a grievous pity if, in a land of freedom, truth were punished, however unpleasant it may be. There is this further consideration, that the law ought not to allow damages to those who are tainted, as L. Gillies once said. If a pursuer is to succeed in a claim for damages, "you" (the jury) "and all must be satisfied that the pursuer comes with clean hands, and without a stain or impurity."

*Paterson v. Shaw*, 5 Mur. 273.

In the early history of our law, however, it was undoubtedly held that the *veritas* of a statement would not protect the utterer from damages.

In early times  
otherwise.

*Scotlands v. Thomson*, M. App. Delinquency 3.

*Hamilton v. Rutherford*, M. 13924.

In the latter case, however, the Court's decision seems to have been hampered by a previous interlocutor refusing proof of the *veritas*. At an early date, however, the Court held in several cases that the *veritas convicii* was a complete defence.

*Fife*, 5 B.S. 574.

*Macdonald v. Macdonald*, 17 F.C. 327.

And since those cases an uninterrupted series of decisions has established the rule that *veritas excusat*.

*Inglis v. Calder*, Hume 594.

*Mitchell v. Thomson*, 7 S. 458.

*Mackellar v. D. of Sutherland*, 21 D. 222.

*Wilson v. Weir*, 24 D. 67.

*Wallace v. Mooney*, 12 R. 710.

*Cook v. Gray*, 29 S.L.R. 247.

*Buchan v. North British Railway*, 21 R. 379.

If the truth of the statement complained of appears on the pursuer's record, the Court will hold the action irrelevant.

*Buchan v. North British Railway Co.*, 21 R. 379.

But if it does not so appear, in order to entitle the defender

If *veritas* appear on pursuer's record, Court will hold action irrelevant. If not, defender must specify facts on which plea of *veritas* rests.

to lead evidence of the truth of the statement complained of, he must on record specifically set forth the facts, giving the time and place of their occurrence, and the names of witnesses to them, which he says will demonstrate the truth of his statements.

*Peat v. Smith*, M. 13941.

*Douglas v. Chalmers*, M. 13939; 3 Pats. Apps. 26.

*p. L. Moncreiff—M'Neill v. Rorison*, 10 D. 15.

If the statement complained of is itself specific, as that the pursuer on a particular day, in a particular place, in the presence of named persons, was drunk, the statement which the defender requires to make on record is merely a reiteration of the statement complained of. But if the statement complained of is a general one, such as that the pursuer is a thief, then the defender requires to set forth specific instances, with the details above mentioned, when the pursuer has done the acts which render the statement true.

*M'Rostie v. Ironside*, 12 D. 74.

But when the accusation complained of is a statement that the pursuer's normal condition is one of drunkenness, the defender will be allowed to prove generally that such was the case.

But even then his proper course is to enumerate on record a number of instances of the pursuer being in that condition, so that the jury may be able to decide from them, if proved, that the general assertion was true.

*Aird v. Kennedy*, 13 D. 775.

*Hunter v. MacNaughton*, 31 S.L.R. 713.

It must be noted, however, that where the defender has made a specific statement against the pursuer, it is not a plea of *veritas* to offer to prove, not the specific instance spoken to, but others which would justify an accusation of a similar defamatory kind.

*M'Kennal v. Wilson*, Hume 628.



It is quite competent to offer to prove the truth of any part of the alleged libel which can be specifically defined. *p. L. Moncrieff.* Competent to prove truth of part of libel.

*M'Neill v. Rorison*, 10 D. 15.

*Mackellar v. D. of Sutherland*, 21 D. 222.

But when the defender has made a general charge against the pursuer, it is not sufficient proof of *veritas* to offer to prove a single specific instance in which what the defender has said was true. Thus when the defender had used words which were innuendoed as meaning that the pursuer had no regard for truth, and was a liar, it was held incompetent to prove, in answer to the pursuer's complaint, that in a specific instance the pursuer had told a lie.

*Milne v. Walker*, 21 R. 155.

Where the proof of *veritas* does not cover the libel or that part of it which the defender has offered to prove the truth of, it goes for nothing, and the jury have only to judge of the libel. *p. L. C. C. Adam.*

*Gibson v. Stevenson*, 3 Mur. 208.

"If the justification," *i.e.* the truth, "is proved, and is co-extensive with the libel" (or that portion of it which the defender offered to prove the truth of), "then there must be a verdict for the defender. But if only part" (of that which the defender offered to prove true) "is proved to be true, the rest must be held false, and as law presumes malice, a verdict must be found for the pursuer." *p. L. C. C. Adam.*

*Greig v. Edmonstone*, 4 Mur. 66.

The rule which requires the defender, in order to lead proof of *veritas*, to specify the time, place, and persons in whose presence the facts establishing the *veritas* took place, is strict, but some slight relaxations of it are allowed. Thus when the defender had made a charge of adultery against a person, a latitude of ten weeks before and after the alleged Relaxations on rule requiring specification.

act of adultery, was allowed to the defender in proving that it took place,

*Douglas v. Chalmers*, M. 13939 ; 3 Pats. App. 26 ;  
but it is very doubtful whether such a latitude would now be permitted. Again, if the defender pleads *veritas* to an action for having accused the pursuer of adultery, the defender must either state the name of the person with whom the adultery was committed, or else expressly state that the name is unknown to him.

*Rankin v. Simpson*, 21 D. 1057.

Opinion of pursuer's superiors that defamation untrue no bar to defender pleading *veritas*.

The truth of an accusation against a person in his office may be proved, although his superiors express conviction that he is not guilty of the offences charged.

*Thompson v. Gillie*, 15 F.C. 636.

Existence of reports to same effect as defamatory matter no justification.

But "the existence of a slanderous report, or its prevalent "currency, is no justification for repeating it," and no *veritas* is proved by merely proving the existence of the report.

*Marshall v. Renwicks*, 13 S. 1127.

*Douglas v. Chalmers*, M. 13939 ; 3 Pats. App. 26.

All that proof of the existence of a current report can do is to mitigate the damages payable for repeating it.

Defender can deny having uttered statement and still plead *veritas*.

A defender can deny that he has made the statements complained of about the pursuer, and still plead *veritas*, so that this defence will be open, though the pursuer succeed in proving that the statements were made by the defender of him.

*Mason v. Tait*, 13 D. 1347.

*Veritas* may be pleaded after issue is adjusted.

*Veritas* can be pleaded by way of amendment to the record even after the pursuer's issue has been adjusted, on payment of the pursuer's expenses since the closing of the record.

To prove *veritas* counter issue must be taken.

*Keith v. Outram*, 4 R. 958.

The defender having pleaded *veritas* in defence must

take a counter issue in order to entitle him to prove the *veritas*.

*Scott v. McGavin*, 2 Mur. 484.

*Hamilton v. Hope*, 4 Mur. 222.

*Greig v. Edmonstone*, 4 Mur. 66.

*Paterson v. Shaw*, 5 Mur. 273.

*Brodies v. Blair*, 14 S. 267.

And without a counter issue the *veritas* will not be allowed to be proved,

No proof of *veritas* allowed without counter issue.

*Scott v. Docherty*, 6 D. 5,

*McNeill v. Rorison*, 10 D. 15,

*Torrance v. Weddell*, 7 M. 243,

*Browne v. McFarlane*, 16 R. 368,

even for the purpose of showing provocation,

*Paul v. Jackson*, 11 R. 460,

or mitigating damages.

*Craig v. Jex Blake*, 9 M. 973.

No diligence will be allowed to recover documents to prove *veritas* unless a counter issue has been taken.

No diligence to prove *veritas* unless counter issue has been taken.

*Blaikie v. Duncan*, 19 D. 983.

It has been suggested that there can be no plea of *veritas* in actions for holding up to public contempt, scorn, ridicule, and hatred. The point has never been properly raised in any case. But if a person merits being held up to scorn, there is no reason why the law should be so unjust as to render any one liable in damages for doing so. Whether a person has been held up to public hatred is a jury question, and probably a defender in an action of this sort would be able, without pleading *veritas*, to lead evidence of the circumstances in which he produced the defamatory matter complained of, so that the jury might come to the conclusion that it was justifiable. But the defender, if he can, and thinks what is complained of justifiable, should propose a counter issue, asking, Whether is it true that the pursuer said or did

*Veritas* in actions for holding up to public hatred, etc.

certain things, and thereby exposed himself to public hatred, ridicule, contempt, and scorn : and the defender should also plead that the matter complained of is fair criticism on the pursuer's conduct. In this way, even if the Court were to hold that the defender had not sufficiently stated a plea of *veritas*, the defender would be able to submit to the jury what is essentially a jury question, viz., Was the matter justifiable as criticism ?

## CHAPTER XVII

### QUALIFIED PRIVILEGE

Qualified privilege—Nature of its protection—Three classes of people enjoy it :

(a) Persons in particular positions ; (a) Privilege of official position ; town councillors, etc. ; heritors ; meeting of Gildry ; members of parochial board ; church courts acting as prosecutors ; ministers ; elders ; dissenting church courts ; professors ; head-masters ; procurators-fiscal ; magistrates taking precognitions ; persons engaged in preventing crime ; persons employed in public official capacities ; customs officers ; post-office officials : (β) Persons engaged in judicial proceedings ; judicial slander ; statements must be either pertinent or relevant to case ; privilege of judicial proceedings protects litigants in statements about third parties ; attaches to statements made in any court ; party not liable for unauthorised statements by counsel or agent ; privilege of confidentiality in judicial proceedings ; privilege of instructions given to counsel ; privilege of statements made in precognition : (γ) Persons discharging duties or asserting rights as citizens, or in relation to the public : (1) Privilege of persons speaking as citizens on public affairs ; electors of a ward ; parishioners ; person writing as to fitness of another to have charge of poor ; member of court of contributors ; petitions to authorities ; person claiming his vote ; person at public meeting ; newspapers discussing public affairs : (2) Privilege of persons discharging public duties ; informers on supposed crime ; accusation made to person followed by information given to authorities regarded as one act ; information incompetently given is not privileged ; information competently given does not lose its privilege ; information given to other public authorities ; to customs ; to ecclesiastical courts ; witnesses ; reports for public authorities ; privilege of persons giving information to others interested in having it ; privilege of statement made to person interested ; to master of servant—(b) Persons in particular relationship to party defamed ; when master privileged in speaking of servant ; persons interested to know servant's character : (1) Servant himself ; (2) court of law when disputes arise between master and servant ; (3) the parents of a servant ; (4) persons asking the character with a view to engaging the servant ; (5) probably foremen placed over servant ; char-

acter need not be true to be privileged ; privilege of superiors in speaking of subordinates ; town councillors and town officials ; police inspectors and constables ; captain and sailor ; schoolmistress and scholar ; headmaster and subordinates ; member of public board and servant of board ; landlord and tenant ; creditor and debtor ; has person interested in another a privilege in defaming a third party to him ; privilege of dissenting church courts in dealing with members of their churches—(c) Privilege arising from nature of subject matter complained of : (a) Privilege of fair criticism ; limits of this privilege ; criticism of professors ; criticism of opponents in controversy ; criticism of books ; criticism of actions decided in Court ; criticism of qualifications of persons for public position ; invited criticism ; protection does not extend to criticism of private character ; question of fairness of criticism usually sent to a jury : (β) Privilege of fair report ; how far this privilege extends in our law is not clear ; probably gives protection to reports of what is publicly transacted : all things publicly transacted are not matters of public concern—What are matters of public concern ? (γ) Privilege of fair retort ; question whether retort was fair may be decided by court ; privilege of answer—Agent privileged where principal is—Extent of protection afforded by qualified privilege—Malice, and in certain cases want of probable cause, must be proved by party complaining—These must be averred on record—Privilege or no usually a question for the Court—Pursuer's averments alone regarded in deciding whether there is privilege—Privilege held to exist may be displaced at proof—Defender pleading privilege must state on record the facts on which it arises—And must either admit words, or state those he used—Defender proving privilege, pursuer may lead evidence to prove malice—When want of probable cause must be averred and proved (a) (a) against persons for utterances made in discharge of official duties ; magistrates ; procurators-fiscal ; constables arresting persons ; church courts acting as prosecutors : (β) Probably not required in actions for judicial slander : (γ) In actions for statements made to the authorities in exercise of public rights or performance of public duties ; complaints made to Parochial Boards or Board of Supervision ; statements made to a Government department ; charges made to the police—(b) Sometimes in actions for statements made by a superior about his subordinate—What will constitute want of probable cause is for the Court to decide—Slight evidence sufficient to displace probable cause—Substitutes for an averment of want of probable cause—Distinction between want of probable cause and malice—Definitions of malice—Facts and circumstances from which malice may be inferred must be stated on record—Three classes of facts and circumstances—Malice may be inferred from impertinence or irrelevance of statements, or the excess of the language—Malice proveable by extrinsic evidence—Facts and circumstances extrinsic of case from which malice may be inferred : (1) Untruth of statement ; (2) absence of probable cause ; (3) absence of precautions for secrecy ; (4) frequent repetition ; (5) previous expressions of ill-will ; (6) previous unsuccessful actions by defender against the pursuer ; (7) reckless utter-

ance of the statement ; (8) impertinence of statement ; (9) mere change of attitude by defender to pursuer not sufficient ; (10) from subsequent events ; (11) a number of slight circumstances ; (12) malice in agent not proof of malice in principal—Malice is attributable to a copartnership—Substitutes for an averment of malice—Defender always privileged in actions for verbal injury.

II. QUALIFIED PRIVILEGE, as the term indicates, does not give the same complete protection to a person enjoying it, as does absolute privilege. Absolute privilege bars a person's right in any circumstances to recover damages from the person who is protected by it. Qualified privilege, on the other hand, only protects the person pleading it from liability unless the pursuer can positively prove certain things which in ordinary cases of defamation the law assumes. "It is very true, on the general principle of law, that when injurious expressions have been used, they necessarily and commonly infer malice, and Erskine and all our writers are distinct on that point. That is no doubt the general rule, but the exceptions to it are various. Wherever the nature of the case is such as requires you to use such injurious expressions, then the general rule of law ceases, and you are entitled to do so, and justify yourself for so doing." *p. L. Balgray.*

Qualified privilege.

Nature of its protection.

*Fortieith v. Fife*, 20 F.C. 8.

"Actions for slander may be considered as of two kinds,—either the defender has, or has not, a right to speak of the pursuer. If he has not, then he is liable if the accusation is false. If he has the right, then he is protected, unless he maliciously makes the accusation. In the first case, it is not necessary to state malice, as it is sufficient if falsehood and injury is proved ; but in the second, malice must be stated and proved, as it is the ground of the action." *p. L. C. C. Adam*, p. 356.

*M'Lean v. Fraser*, 3 Mur. 353.

"It appears to us that the law and justice of the matter lies in this, viz., that when a private person injures by false

“ and calumnious statements, the legal imputation of malice attaches *prima facie* to the mere words, and that therefore the task of removing this is laid on the defender ; but that, where the same words are spoken on an occasion of official duty, no matter what, this imputation does not attach *prima facie* to the expressions, but must be proved by the accuser. We cannot confine this principle merely to the common cases in which it has more usually appeared, but extend it to every case of public duty whatever.” *p. LL. Cockburn and Ivory*, pp. 1068, 1069.

*Adam v. Allan*, 3 D. 1058.

“ In ordinary actions of slander the words spoken or written by the defender being in themselves defamatory and actionable, the law presumes them to be false, and also presumes the motive of the person speaking or writing them to be malicious—the defender being allowed, if he choose, to undertake the burden of proving the truth of the statements spoken or written by him. This rule applies in all cases where the defender has no particular right or occasion to speak of the pursuer. But there is another class of cases, where the defender has occasion to speak of the pursuer either in the performance of a duty or in the exercise of a right,” and the latter are privileged. *p. L. J. C. Inglis*.

*Mackellar v. D. of Sutherland*, 24 D. 1124.

“ I concur in the view presented to us, that in every case of slander the law implies malice or *malus animus* ; and that the only difference between an ordinary and a privileged case is that in the former malice is presumed without proof; in the latter it requires express evidence for its establishment.” *p. L. Kinloch*, p. 434.

*McBride v. Williams*, 7 M. 427.

“ Privilege consists in the right of a man to express his honest opinion on a matter in regard to which he has a duty or a right or an interest to speak to any other who



" has a corresponding duty or right or interest. Now this is " the law even in regard to matters of private concern." p. L. J. C. Moncreiff, p. 946.

*Auld v. Shairp*, 2 R. 940.

A person, therefore, in uttering or publishing defamatory statements, enjoys a qualified privilege if he is in such a position that the law recognises he had a duty, a right, or an interest to speak freely. Two questions arise as to qualified privilege. *First*, What persons are by law entitled to its protection? and *Second*, What does its protection amount to?

*First*. There are three distinct classes of persons entitled to the protection of qualified privilege: (a) Persons who, at the time of uttering the statements complained of, occupy a position which, the law recognises, entitles them to speak freely on the subject; (b) Persons who are in such relationship to the person complaining as, the law recognises, gives them a right freely to speak of the person complaining; and (c) Persons the nature of whose utterances, the law holds, is entitled to protection.

Three classes of people enjoy qualified privilege.

(a) Persons of this class fall into one or other of three subdivisions.

(a) Persons in particular positions.

(a) Persons who occupy official positions are privileged in their utterances if they be either pertinent or relevant to any matter falling within the scope of their official duties.

(β) Persons engaged in litigation are privileged in their utterances made in the judicial proceedings and relative to the subject of litigation if the utterances are pertinent or relevant.

(γ) Persons are privileged in their utterances in the exercise of their rights and duties as citizens.

(a) Privilege of official position. Town councillors, etc.

(a) The privilege of official position. Members of town councils and public boards are privileged in what they say at

meetings of the council or board relative to anything which has to be considered by the council or board.

*Chiene v. Archibald*, 6 S.L.R. 62.

Thus a member of a water and drainage committee of a local authority is privileged when the committee is discussing an outbreak of scarlet fever, in saying it is traceable to a particular dairy.

*M'Lean v. Adam*, 16 R. 175.

**Heritors.** And a heritor at a heritors' meeting is privileged in expressing his opinion of a person proposed for the parish committee to administer poor funds.

*Newlands v. Shaw*, 12 S. 550.

**Meeting of Guildry.** The maker of pertinent remarks at a meeting of Guildry seems to be entitled to this privilege.

*Anderson v. Rintoul*, 4 Mur. 231.

**Members of parochial board.** It was once laid down that this privilege was so high that a person at a board meeting, speaking with reference to its business, is privileged in what he says, though his remarks be neither pertinent nor relevant.

*Stewart v. Sproat*, Poor Law Mag. 1858.

But this seems to be inaccurate, and the words complained of must either have some pertinency or relevancy in order to entitle the utterer to privilege. Thus it was held that a member of a parochial board speaking at the board about funds claimed by both the board and one of its members, was not privileged in describing the latter's conduct with regard to the funds as "mean, dishonest and despicable," as such statements seemed to have no pertinency to the question under discussion.

*Rae v. M'Lay*, 14 D. 988.

And a member of a town council or public board will enjoy no privilege if, at a meeting of the council or board, he makes statements about matters with which the council or board have no concern. Thus, when a person in a public body

began to discuss the qualifications of another member of the body to serve on another public body, it was held that he had no privilege.

*Fraser v. Wilson*, 13 D. 289.

On the other hand, a member of a town council or public board does not lose his privilege because, although the statement complained of was made at a council or board meeting, others than the members were present.

*Pittard v. Oliver*, L.R. 1891, 1 Q.B. 474.

Church Courts acting as prosecutors and not as tribunals appear only to have a qualified privilege, and an action for defamation can be founded against them when they have acted as prosecutors if malice and want of probable cause are averred and proved.

Church Courts  
acting as  
prosecutors.

*Smith v. Presbytery of Auchterarder*, 12 D. 296.

Ministers enjoy a privilege in certain circumstances in what they say in that capacity. In certain cases this privilege (as has been shown *supra*, p. 130) is absolute; in others, it is merely qualified; in others, where ministers seem to have thought it existed, it does not. A minister of the Established Church when exercising in a Church Court his *quasi* judicial functions on a matter competently before it, and when promulgating a decree of a Church Court on a matter competent to it, is absolutely privileged.

Ministers.

*Adam v. Allan*, 3 D. 1058.

So also when he refuses to give the ordinances of religion and gives reasons for so doing, either in the Church Courts or in private admonition to the parties themselves. These are purely ecclesiastical matters, and the minister is not amenable to the Civil Courts respecting them. But if he propagate, in public, stories prejudicial to a parishioner's reputation, or even give a reason for his conduct, he is not privileged because he is a minister.

*MacQueens v. Grant*, M. 7466 & 7468.

Again, when a minister of the Established Church acts regularly in discharge of the duties other than his *quasi* judicial ones imposed on him, as such, by law, he enjoys a qualified privilege. Thus, when a minister writes to one of his heritors and elders to ask him to interfere with the conduct of one of the latter's employees he seems to be privileged,

*Grant v. Coltart*, 12 S. 385,

as the minister is then acting regularly and within his proper functions. And when a minister makes charges against a parishioner to the Kirk Session he enjoys a qualified privilege.

*Grant v. McCowan*, 1 S.L.T. 73.

But "no clergyman was entitled to make his pulpit the "vehicle of slanderous expressions. He was not permitted "to plead the pulpit as privileging him to this effect, or to "screen himself under any plea of his office as a clergyman." *p. L. J. C. Boyle*.

*Dudgeon v. Forbes*, 11 S. 1014.

Thus a parish minister was found liable for statements he had made from the pulpit about the parish schoolmaster.

*Cooper v. Greig*, Hume 648.

And a minister is not entitled in the pulpit to attack any man's private character, though he may preach against sin, so long as he does not point his remarks at any person in particular.

*Scotlands v. Thomson*, M. App. Delinquency 3.

*p. L. J. C. Boyle—Adam v. Allan*, 3 D. 1058.

*Snodgrass v. Wotherspoon*, 5 B.S. 573.

*Dunbar v. Stoddart*, 11 D. 587.

Elders.

An elder, when sitting in the Kirk Session, or other Church Court, and discussing regularly a matter competent to its jurisdiction as a Court in its judicial capacity, enjoys the absolute privilege as previously described of Church Courts acting judicially. When not thus protected by

absolute privilege he will enjoy a qualified privilege when regularly performing the other duties proper to his office; but if he departs from the regular course of procedure, or does anything which is not within the scope of his duties, his privilege disappears. Thus it was held that an elder is not necessarily privileged if, having been entrusted by his minister with finding out who is the father of an illegitimate child, so that it may not be put on the parish, he shows a statement about the matter by the mother to his co-elders.

*Kidd v. Paterson*, Borth. 391.

But it is submitted that had the statement been regularly laid before a meeting of a Church Court, having jurisdiction in the matter, the elder would have been privileged.

Any privilege of a qualified nature which may exist in the Church Courts of dissenting churches arises out of the contract between its members, and is discussed *infra*, p. 180. Dissenting  
Church Courts.

“ A professor discussing a matter which has been regularly Professors.  
“ brought before a Senatus Academicus . . . whether relative  
“ to the conduct of a brother professor, his own individual  
“ interest as a professor, or those of the body to which he  
“ belongs, stands in a privileged situation with the presump-  
“ tion of law in favour of the innocence of his intentions as  
“ to the use of words of a slanderous nature—keeping closely  
“ to the subject of discussion, not travelling into impertinent  
“ matter, or using the occasion as a cover and cloak for  
“ malice as indicated by the whole of his conduct and circum-  
“ stances of the case.” p. L. J. C. Boyle.

*Hamilton v. Hope*, 5 S. 569.

And thus where certain professors on behalf of the council of a veterinary college wrote to one of their colleagues, and sent a copy of the letter to the secretary of the college, asking the colleague to retire, and referring to the unseemly disturbances in his class, they were held privileged.

*M'Bride v. Williams*, 7 M. 427.

And the principal of a college in a university writing to the patron of a chair in the college about a candidate for that chair is privileged.

*Auld v. Shairp*, 2 R. 940.

But a professor cannot take students apart, and speak ill of a man, and then shelter himself by the plea that it is his duty to warn his students against ill-doers.

*Anderson v. Richardson*, M. 3438.

Head-masters. In short, a professor's privilege only attaches to him when he expresses himself to the proper authorities in an appropriate manner. The rule with regard to professors in universities and colleges has been extended to the head-masters of schools, and they are held privileged in making reports, so long as they are in *bonâ fide* and within the scope of the head-master's functions, to the governors about their subordinates, but not in repeating them to others.

*Milne v. Bauchope*, 5 M. 1114.

Procurators-Fiscal.

Procurators-Fiscal, as the official prosecutors for crimes and offences, enjoy a qualified privilege, and their actions in office will be treated by the law as in *bonâ fide* unless the contrary is clearly made out.

*Craig v. Peebles*, 3 R. 441.

They, therefore, are privileged in making an application to Court in the course of their duty, even though they make it incompetently; but it would seem they are not privileged if they ask something they have no right to get. See opinions of the L. P. M'Neill and L. Ardmillan.

*Nelson v. Black*, 4 M. 328.

And therefore if a Procurator-Fiscal lays an information against a person and causes him to be arrested, and the person is not within his jurisdiction, he loses his privilege.

*M'Crae v. Sawers*, 13 S. 443.

Magistrates taking precognitions.

Closely allied to the privilege of a Procurator-Fiscal is that of a magistrate who takes a precognition or deposition of a

person and transmits it to the proper quarter, as to the Lord Advocate. Such a magistrate is privileged even though it be alleged that he acted partially and irregularly.

*Harper v. Robinson*, 2 Mur. 283.

*Craig v. Marjoribanks*, 3 Mur. 341.

But the mere fact that a person is a J.P. and a freeholder does not give him a privilege in writing to the Lord Lieutenant and the M.P. for his county about a person connected with the county. "This is not a privileged case, as the "defender was not in the confidential situation that entitled "him to interfere. The confidence which was pleaded by the "defender was of his own seeking, and this cannot entitle "him to traduce the character of a third person." *p. L. Gillies*.

*Tytler v. Macintosh*, 3 Mur. 236.

Any person, too, engaged in the duty of preventing crime is privileged in acting in performance of his duty. Thus a sheriff who gives orders to arrest all persons suspected of having been engaged in illegal acts is privileged.

Persons engaged in preventing crime.

*Beaton v. Ivory*, 14 R. 1057.

Police constables who arrest a girl on a charge of importuning, and take her to the police office on the charge, are privileged.

*Young v. Magistrates of Glasgow*, 18 R. 825.

And any person in a public official position, who in the discharge of his duties makes statements about third parties in the proper quarter, is privileged. Thus an employee in the customs being charged before his superiors by a person with obstructing that person is privileged in stating that the person complaining has defrauded the customs.

Persons employed in public official capacities. Customs officers.

*Fenton v. Currie*, 5 D. 705.

And a post-office official making enquiries into a departmental defalcation and reporting thereon is privileged. See *L. Murray*.

Post-office officials.

*Blackett v. Lang*, 16 D. 989.

(β) Persons engaged in judicial proceedings. Judicial slander.

(β) If a person complains of any statements made by others than judges, counsel, or witnesses in the course of judicial proceedings as being defamatory, the case is said to be one of judicial slander, and the rule is that if the statements were made relative to the subject under litigation, and were either pertinent or relevant to the subject, the utterer of them enjoys a qualified privilege.

*Scott v. Turnbull*, 11 R. 1131.

*Selbie v. Saint*, 18 R. 88.

p. L. J. C. Moncreiff—

*Gordon v. British & Foreign Metaline Co.*, 14 R. 75.

*Mackellar v. D. of Sutherland*, 24 D. 1124.

*Hallam v. Gye*, 14 S. 199.

*Davidson v. Megget*, 1 S. 3.

*Aitken v. Dudgeon*, 3 Mur. 227.

At one time the Court hesitated as to whether what had been stated in legal proceedings could be reputed a formal injury,

*Hill v. Sim*, M. 13921,

but it is now clearly decided that it can be if the person complaining can prove that the statements were made, not for the purpose of aiding the cause of the party by whom they were made, but of injuring the complainer. But the statements complained of must have either some pertinency or relevancy to the case in which they were made. "If the slander is palpably foreign to the whole object and drift of the action, and manifestly irrelevant according to any notion which a man can fairly take of his own case," the privilege is lost. p. L. J. C. Hope.

*M'Intosh v. Flowerdew*, 13 D. 726.

"We are bound, when judicially called on, to make statements, but we are equally bound not to make this a cloak for calumny." p. L. C. C. Adam.

*Brown v. Wintours*, 2 Mur. 451.

The tendency of the law is to allow a person in judicial

Statements made must be either pertinent or relevant to case.



proceedings a wide scope in stating his case, and to give him privilege whenever what he has stated has any material bearing on the subject. Thus statements made in defence to an action, to the effect that defamatory statements made in another legal proceeding were true, are privileged, being pertinent to the defence, and if a person complains of these statements as defamatory, the maker of them is privileged.

*Bell v. Black*, 38 Scot. Jur. 211.

And a statement made in pleadings will not necessarily be held to have been unprivileged, even though the judge, in the proceedings in which it was made, has ordered its deletion.

*Mackellar v. D. of Sutherland*, 21 D. 222.

If a statement made in judicial proceedings, as by making it on record, is privileged when it was inserted, it does not lose its privilege if subsequently the maker of it finds himself wrong on the matter. *p. L. J. C. Moncrieff*.

*Moscrip v. M'Caig*, 10 S.L.R. 140.

One decision stands in the books, and seems hostile to the rule allowing freedom in judicial proceedings. A sued B for having stated that A had been guilty of adultery, and A averred that by this statement his family peace had been broken. B in defence said that A's family peace had not been broken by his (B's) statement, as it was broken previously by A's wife having heard that, before her marriage, A had been guilty of immoral conduct. On this statement in defence A founded another action, and although B pleaded privilege, the Court held there was none. It would seem that nothing could be more pertinent in answer to a statement that a man's family peace had been disturbed by a particular thing, than to plead that the disturbance took place before the particular thing happened; and in view of the more recent decisions, this case must be regarded, if not as a bad decision, as of very doubtful authority.

*Brodies v. Blair*, 12 S. 941.

Privilege of judicial proceedings protects litigants in their statements about third parties.

The privilege attaching to statements made in judicial proceedings is so high that even when persons who are not parties to an action are mentioned in the proceedings, the party mentioning them will be privileged in doing so, if his statement is relevant or pertinent to the case. Thus, when B in an action between him and A had stated in his pleadings that A had lived with C, a married woman, and this statement was pertinent to the litigation between A and B, B was held privileged in an action against him by C founded on the statement.

*Cullen v. Ewing*, 10 S. 497; reversed, 6 W. & S. 566.

In a very similar previous case it had been remarked by the Court:—"As for the privilege of judicial proceedings, "certainly a party to a law-suit must have full freedom to "state his case and to impeach where it is necessary, and "however deep it may strike the character and conduct of "his adversaries, and even of third parties when these are "involved in the investigation indispensable for the decision "of the causes. But a litigant is not at freedom to throw "out serious charges against his adversary even, and much "less against strangers not parties to the suit in order to "obviate every collateral circumstance which happens to be "mentioned, or to meet every incidental and perhaps irrelevant remark that may be thrown out in the course of the "pleadings."

*M'Vane v. M'Alpine*, Hume 625.

In so far as this decision may run counter to that in *Cullen* it is of course overruled by the latter, which was a judgment of the House of Lords. But, though loosely expressed, it can be read in a way quite in accord with the law as it stands. Expressed briefly it does not seem to lay down any other rule than that what is neither pertinent nor relevant will not be privileged.

The privilege attaches to statements made in any Court.

"There is no doubt that a J.P. Court affords as complete protection as the highest Court in the world."

*Gibsons v. Marr*, 3 Mur. 258.

The privilege attaches to statements made in any Court.

And a Licensing Court is a place of privileged utterance.

*Williamson v. Umphray*, 17 R. 905.

And proceedings in bankruptcy enjoy the privilege. Thus statements made in a note of objections lodged with the sheriff-clerk to the election of a trustee are privileged as being made in a judicial process.

*Moscip v. McCaig*, 10 S.L.R. 140.

A party to a judicial proceeding is, of course, not responsible for any defamatory statement made by his agent or counsel without his knowledge or instructions.

Party not liable for unauthorised statements by counsel or agent.

*Watsons v. Smeaton*, Hume 624.

Closely allied to the privilege of persons making statements in judicial proceedings is a privilege which has been occasionally accorded to parties who have made defamatory statements, not in the proceedings before the Court, but relative to them. This might be called the privilege of confidentiality, and with regard to it the proposition may be laid down—That all things said by parties concerned in judicial proceedings, and necessary to their being properly conducted, have a qualified privilege attached to them. Thus a person is privileged in the instructions which he gives to counsel, and if an action is raised against him for defamatory statements made by counsel on his instructions, the complainer must prove that the instructions were malicious.

Privilege of confidentiality in judicial proceedings.

Privilege of instructions given to counsel.

*Fortcith v. E. of Fife*, 2 Mur. 463.

*Bayne v. Macgregor*, 24 D. 1126.

And a defamatory letter from a client to his agent is similarly privileged. *p. L. Kyllachy*.

*Williamson v. Umphray*, 17 R. 905.

Or from an agent to a client.

*Rhind v. Kemp*, 1 S.L.T. 367.

And a creditor in giving his reason for refusing to consent to a discharge of his bankrupt debtor is entitled to say to another business man that the debtor was a fraudulent bankrupt.

*Stein v. Marshall*, 13 F.C. 309, M. App. Proof 1.

*Torrance v. Leaf*, 13 S. 72.

This privilege of confidentiality was in one case carried to an extreme point when it was held that a person against whom trustees had raised an action was privileged in writing to them to comment on the extravagance of the actions raised in their name by their law agent.

*Manson v. Macara*, 2 D. 208.

And in another case a law agent was held privileged in making statements about a lady to her law agent.

*Ramsay v. Nairn*, 11 S. 1033.

Privilege of statements made in precognition.

The privilege also extends to persons making statements on precognition. Thus, when a person was precognosed by two Free Church elders, though he himself was not a member of the Free Church, about the conduct of a member of the Church, he was held privileged in his statements.

*Gibb v. Barron*, 21 D. 1099.

This is a very strong case in support of the proposition, for here the defender was not being precognosed for a Court which could have compelled his attendance. This decision would almost warrant a statement that a person is privileged who makes a statement in answer to a question.

(γ) Persons discharging duties or asserting rights as citizens, or in relation to the public.

(γ) Persons have certain rights and duties as citizens or in relation to the public, and when speaking in exercise of those rights or in the performance of those duties, they are privileged in speaking freely. The cases in which this privilege exists may be grouped into two classes. (1) Cases where persons speak in exercise of their rights in relation to public affairs. (2) Cases where persons speak in discharge of their duties to the public.

(1) All citizens have a right to speak about the public affairs of the State, or of the locality in which they have an interest, and they are privileged in doing so, and in discussing relevantly or pertinently the persons who are seeking public positions. "It is well recognised in practice that a "different and stricter standard of construction is to be applied "to calumnious expressions affecting a person in his business "relations from that applied to expressions used of the same "person in his public capacity. We have discouraged actions "of damages directed against public men for language used "by them, whether in the more important field of general "politics, or in regard to the administration of municipal "affairs or even of charitable societies. No doubt language "used of a public man may be libellous, as for instance if "one were to accuse an M.P. of having obtained his seat by "bribery, but such accusations are rarely made, and as has been "often observed, there is practically no limit to the language "which may be used in public controversy except that which "is imposed by good taste and good feeling towards an "opponent."

(1) Privilege of persons speaking as citizens on public affairs.

*p. L. M'Laren—Waddell v. Roxburgh*, 31 S.L.R. 721.

*p. Parke, B.—Parmiter v. Coupland*, 6 M. and W. 105.

From these remarks it is not quite clear how this privilege of discussing public men and affairs ought properly to be regarded. There is a tendency, more especially in England, to regard public criticism as not defamatory. In this view those who indulge in it are not liable in damages for that reason. On the other hand, the more accurate view seems to be that what is defamatory in its nature is so whether uttered in criticism on public men and matters or not; but that if so uttered about public men and affairs the critic will have a protection afforded him which he would not enjoy if similar remarks were made about persons in their private capacity. But according to our law, the discussion of public men must

Electors of a ward.

be of a serious and deliberate kind; and, if a person sets himself to ridiculing his opponent's position, he may render himself liable to an action for holding up to public ridicule, contempt, and hatred. This privilege of discussing public men and affairs is amply illustrated. Thus the elector of a ward in a city is privileged in stating objections to a candidate for that ward in the town council.

*Bruce v. Leisk*, 19 R. 482.

But an elector in one ward or district is not privileged in discussing a candidate for another ward or district.

*Anderson v. Hunter*, 18 R. 467.

Parishioners.

A parishioner is privileged in writing a letter to the Heritors and Kirk Session, and in criticising therein the minister's behaviour as to relief of the poor, but he loses the privilege when he wanders from the proper business of the meeting to make accusations against the character of the minister which would affect his usefulness as a minister.

*Sangster v. Hepburn*, Hume 617.

Person writing as to fitness of another to have charge of poor.

And a person writing to a parochial board or the Board of Supervision regarding the character of another with whom pauper children are boarded is privileged.

*Croucher v. Inglis*, 16 R. 774.

Member of a court of contributors.

So also in a court of contributors to an infirmary, a member is privileged in discussing the affairs of the infirmary, but not in attacking the conduct of a person in matters not concerned with the institution.

*Craig v. Jex Blake*, 9 M. 973.

Petitions to authorities.

Petitions to Parliament, and in certain cases to the General Assembly, are (as explained *supra*) absolutely privileged. Petitions to other authorities with regard to matters with which those authorities have to deal are privileged if pertinent or relevant; and thus a petition to licensing justices is privileged, and the mere fact that a person appears in support

of the petition is not a fact from which malice can be inferred.

*Keay v. Wilsons*, 5 D. 407.

It was once held that a person claiming his vote was privileged in saying that his claim in the previous year had been refused through the culpable and wilful misstatement of another person, but this seems a very doubtful decision.

Person claiming his vote.

*Gray v. Walker*, 15 S. 1296.

But a person is not privileged in calling another who has disturbed a public meeting a blackguard. Such a remark is one rather directed against the person's individual conduct than his public action.

Person at public meeting.

*Thom v. Graham*, 13 S. 1129.

It has been definitely decided by the Court that although a newspaper may have a privilege in discussing the public affairs and public men of the locality in which it is published, it will lose it if the discussion occurs in an anonymous letter published in its columns, and if it refuses to disclose the author.

Newspapers discussing public affairs.

*Brims v. Reid*, 12 R. 1016.

*McKerchar v. Cameron*, 19 R. 383.

The ground of these decisions seems to be that the Court, not knowing who the writer is, cannot know whether he is interested in the district or not, and that if the newspaper refuses to disclose his name it must be held to descend to the writer's position, which cannot be one of privilege unless the privilege is apparent. With all submission it seems that this rule ought to be reconsidered. When a newspaper is sued for defamation, whether in a leading article or in an anonymous letter, the fault complained of is that of publishing. Many cases must have occurred where persons uttering defamatory statements which have been held privileged, have not been the authors of them. Possibly the authors of them had no privilege, and if they were sued could plead none. But if the utterer of a libel is privileged, why should he lose

his privilege if he adopts and utters the words of another? A newspaper adopting an anonymous letter in its columns seems to be in this position. It would seem to be privileged if it were to put the letter in the form of a leading article. No question then would be raised as to who was the author. He might hail from Shanghai or the Straits of Malacca. In the case of a leading article, the position of the publisher alone is considered. How can anything more than that be considered in the case of an anonymous letter adopted by a newspaper? A, a native of Japan, prepares a speech which B delivers at a ward meeting in a city in Scotland about a candidate for the ward. B is privileged in what he says. Or A takes the speech to B, the editor of the local paper, and B puts it in as an editorial, and B is privileged. But if A sends the manuscript under a *nom de plume*, and B publishes it and adopts it, B is not privileged. The rule laid down in these two cases is, in fact, absurd, and ought to be altered at the first opportunity.

(2) Privilege of persons discharging public duties. Giving information as to supposed crime.

(2) When persons speak in discharge of their duties to the public, they are privileged in doing so. By far the most important example of this sort of privilege is that which protects persons when they give information in the proper manner to the proper authorities with regard to alleged crimes or offences. A person giving information to the criminal authorities to the effect that another has committed a crime or offence is privileged in doing so. Thus it was early held that persons who, acting *bona fide*, and having good reason to believe that another is guilty, have him imprisoned on the charge they make, are privileged.

*Dundas v. Arbuthnot*, M. 13922.

And numerous cases exemplify the rule.

*Warrand v. Falconer*, M. 13933.

*Callender v. Milligan*, 11 D. 1174.

*Page v. Buchan*, 17 D. 1079.



*Cameron v. Hamilton*, 13 D. 423.

*p. L. Deas—Thomson v. Adam*, 4 M. 29.

*Green v. Chalmers*, 6 R. 318.

*Lightbody v. Gordon*, 9 R. 934.

*Urquhart v. Mackenzie*, 14 R. 18.

And if a person accuse another of crime, and forthwith gives information to the police, the whole is regarded as one act, and is privileged.

Accusation made to person followed by information given to authorities regarded as one act.

*Ferguson v. Colquhoun*, 24 D. 1428.

*Hassan v. Paterson*, 12 R. 1164.

But a person who has given information to the authorities is not privileged in repeating it subsequently to the public.

*Walker v. Cumming*, 6 M. 318.

*Douglas v. Main*, 20 R. 793.

And a document which is privileged, if sent to the proper authorities, loses its privilege if published to the world.

*Greig v. Edmonstone*, 4 Mur. 66.

And a person is not privileged in making a charge to the authorities incompetently. Thus, when a person made a verbal charge to a J.P. about another man, even though he brought forward witnesses to substantiate it, he was held not privileged.

Information incompetently given is not privileged.

*Smith v. Innes*, 5 S. 364.

But if the charge is made competently to the proper authorities, the mere fact that it was subsequently abandoned, or found groundless, will not deprive the person making it of his privilege.

Information competently given does not lose its privilege.

*Sheppard v. Fraser*, 11 D. 446.

*M'Pherson v. Cattnach*, 13 D. 287.

And a person may be privileged in handing another into custody, although this is not followed up by a charge.

*p. L. P. M'Neill*.

*Smith v. Green*, 15 D. 549.

A privilege similar to that which protects people giving

Information given to other public authorities.

To customs.

information to the criminal authorities, attaches to persons giving information in a regular manner to other public authorities, who have an interest in receiving it. Thus it was held that the giving of private information to the Commissioners of Customs against a person in their employment was not relevant to found a process of scandal, and that the Commissioners could not be convened as witnesses to depone on such information.

*James v. Watkins*, M. 3432.

At the present day, action would certainly not be refused on such a case, but it would probably be held that the defender was privileged if he had laid the information in a formal and regular manner.

To ecclesiastical Courts.

A charge duly made to an ecclesiastical Court is as privileged as one to a criminal Court. Thus, while a parishioner telling an elder that another parishioner was turned out of an hotel drunk, was held not privileged in doing so; he was held privileged in writing to the minister as moderator of the session, and in making the charge to him as such.

*Rankine v. Roberts*, 1 R. 225.

A person is not privileged in notarially protesting against the issuing of a certificate of proclamation of banns on grounds which are not good against a marriage taking place.

*Hendersons v. Henderson*, 17 D. 348.

Witnesses.

Although in some cases witnesses are absolutely privileged (*supra* p. 138), there are other instances where persons practically in the position of witnesses have only a qualified privilege. Thus, a person called on by the authorities to make a report is privileged in what he says in it as long as the statements are relevant. And so a medical man called on for his opinion on a case by the procurator-fiscal, is privileged in his report on the case.

Reports for public authorities.

*Urquhart v. Grigor*, 3 M. 283.

And a medical man is privileged in granting a certificate of insanity, if he makes it on due deliberation, and after proper enquiry; and the family agent is not liable for getting a member of the family sent to a lunatic asylum, even if the medical certificates turn out wrong, provided that the agent did not know at the time that his client was not insane.

*Mackintosh v. Fraser*, 22 D. 421.

For a medical man called on to give his opinion upon a matter of opinion, and giving that opinion honestly, is not responsible for the soundness of it, nor for its consequences.

*Urquhart v. Grigor*, 3 M. 283.

Although it may not be privileged for a family medical attendant to say to the husband of a woman who had died that the midwife had poisoned her, he is privileged in saying so to a detective enquiring into the woman's death.

*Reid v. Coyle*, 29 S.L.R. 638, 19 R. 775.

The privilege which protects persons giving information to the authorities has been in a few cases extended, so as to protect persons who have given information to others, relative to third parties. Such information, when given by a person who occupies or has occupied the position of master or superior to the person about whom it is given, to individuals interested in knowing about the latter, is undoubtedly privileged. But the cases referred to do not fall into the category of information given by a master or ex-master about a servant or ex-servant to a person interested in knowing about the latter. They are merely cases where it has been held that if B is interested to know about C, and asks A about C, or even if A, without being asked, volunteers a statement, A is privileged in what he says. Thus it was said, "Every one is entitled to make a confidential communication as to the circumstances of another to a friend who calls for it with a view to dealing with that person, in the same way as a

Privilege of persons giving information to others interested in having it.

Privilege of statement made to person interested.

"master when called on is entitled to tell the truth of his servant, though that may reflect on the character of the servant." *p. L. C. C. Adam.*

*Couseland v. Cuthil*, 5 Mur. 148.

And it would seem that it was held that a man is privileged if, in answer to a question by a person interested to know, he slanders another.

*Wight v. M<sup>c</sup>Luckie*, 8 S. 493,

To master of  
servant.

But these two cases must be looked on with suspicion. It is true that quite recently it has been held that a person who believes property has been stolen from him by the servant of another, is privileged in saying so to the latter.

*M<sup>c</sup>Fadyen v. Spencer & Co.*, 19 R. 350.

This decision, however, is hardly reconcilable with that in

*Moore v. Reid*, 20 R. 712,

and the latter is the later, and seems the more reasonable judgment. In one case it was held that although a law agent is not privileged in making charges about a lady to her trustees, he is in making them to her law agent.

*Ramsay v. Nairne*, 11 S. 1033.

In England, however, it appears that privilege is held to exist where one person makes a communication to another, the one having an interest or duty to make it and the other having an interest or duty to receive it.

*Laughton v. Bishop of Sodor and Man*, L.R. 4 P.C. 495.

(b) Persons in  
particular  
relationship  
to party de-  
famed.

(b) The law allows a privilege to a person who, being in the position of master or superior to another, or having been in that position, speaks to the servant or subordinate, or to any one having an interest in him, about his conduct or behaviour. This privilege when claimed by a master for words spoken to his servant rests on the interest the master has in the servant, and the right to justify his treatment of him. When claimed by a master for defamatory matter uttered by him to another than the servant who has an

interest to know (as when uttered to a person proposing to engage the servant), this privilege rests on the obvious expediency of allowing a person who has had full opportunity of gauging another's character, to speak freely to one who is interested materially in knowing it.

The distinction between when a master may and when he may not speak regarding his servant's conduct, was drawn in

When master privileged in speaking of servant.

*Christian v. L. Kennedy*, 1 Mur. 419,

where it was laid down that a master is not compelled to give a character, but by law he is justified in giving a true one. He is not, however, entitled to publish it at his jovial meetings, or anywhere, without sufficient cause for stating it. The privilege only attaches when the master is speaking to persons having an interest to know. Such persons are:—

(1) The servant himself.

*Watson v. Burnet*, 24 D. 494.

*Stuart v. Moss*, 13 R. 299.

*Laidlaw v. Gunn*, 17 R. 394.

Persons interested to know servant's character.  
(1) Servant himself.

But it would seem that a person is not privileged in threatening another who had authority to collect his debts that he will report him to the procurator-fiscal for supposed defalcations.

*Ramsay v. MacLay & Co.*, 18 R. 130.

L. Young dissented in this case, and it is a doubtful precedent.

(2) A Court of Law when the servant is suing for wages.

*Watson v. Burnet*, 24 D. 494.

(3) In certain cases the father or mother of a servant when asking why the latter was dismissed.

*Watson v. Burnet*, 24 D. 494.

(2) A Court of Law when disputes arise between master and servant.  
(3) The parents of a servant.

But it is doubtful whether a person would be privileged in speaking to the father or mother of a person who was completely forisfamiliarated.

(4) Persons asking the character with a view to engaging a servant.

(4) Persons asking the character either with a view to engaging the servant themselves, or obtaining an engagement for him.

*Farquhar v. Neish*, 17 R. 716.

(5) Probably foremen placed over servant.

(5) Probably persons, such as foremen, who under the master have control over the servant. In fact in England it has been held that an employer is privileged in stating to his employees the ground for dismissing one of their number.

*Hunt v. G. N. Railway Co.*, L.R. 1891, 2 Q.B. 189.

Character need not be true to be privileged.

The privilege is higher than is stated in *Chisholm v. Kennedy* (*supra*), for the character given need not be true. If it required to be so, a master would be in no better position than an outsider. The privilege amounts to this, that if the statement complained of has been made to any of the persons enumerated, the master will not be liable unless it is proved to have been uttered maliciously; and though its falsehood may raise a suspicion that it was malicious, it is not enough in itself to prove it to be so. A master may have a very false idea of what his servant's character is, and if he *bona fide* expresses his false opinion to the persons above enumerated he is privileged. "The privilege arising out of the relation of master and servant entitles if it does not require the master to exercise full freedom of speech in reference to the conduct and character of the servant on such occasions as may raise a duty on the master to express his opinion." *p. L. Kinnear*.

*Milne v. Smiths*, 20 R. 95.

Privilege of superiors in speaking of subordinates. Town councillors and town officials.

The privilege of a master is enjoyed also by those who, although not actually in the contractual relation of masters to others, are their lawful superiors. Thus a town councillor is privileged in discussing the behaviour of a town official.

*p. L. J. C. Moncrieff—Shaw v. Morgan*, 15 R. 865.

*p. L. P. Inglis—Neilson v. Johnston*, 17 R. 442.

A police inspector and procurator-fiscal in sending a report to the chief constable on the conduct of one of his men.

Police inspectors and constables.

*M'Murphy v. Campbell*, 14 R. 725.

The chief constable himself in criticising the reports of his subordinates.

*Innes v. Adamson*, 17 R. 11.

A captain of a vessel in entering an alleged breach of discipline on the part of one of his men in the log-book, as prescribed by the Merchant Shipping Act.

Captain and sailor.

*Hill v. Thomson*, 19 R. 377.

A schoolmistress in remonstrating with her scholars on their conduct.

Schoolmistress and scholar.

*M'Neill v. Forbes*, 10 R. 867.

A head-master of a school in reporting on his subordinates to the governors.

Head-master and subordinates.

*Milne v. Bauchope*, 5 M. 1114.

A member of a public board, such as that of customs, in complaints he makes against a servant of the board to the board.

Member of public board and servant of board.

*Boyd v. Reid*, Hume 610.

There are two or three cases which may be grouped in the class of statements made by superiors of their subordinates, and where privilege has been held to exist though the ground of the privilege is not clear. The decisions themselves are of doubtful authority. Thus it was held that a landlord who went about saying that his tenants had not paid rent was privileged.

Landlord and tenant.

*Buchans v. Walch*, 20 D. 222.

And it would appear that the agent of a landlord going to a sale of the tenant's goods, and declaring it must stop unless caution for the rent were found, is privileged in doing so.

*Yeo v. Wallace*, 5 S.L.R. 253.

L. Shand expressed the opinion that a creditor in a bill is privileged if, after one of the debtors under it had repudiated his signature, he wrote to a second debtor under it, telling

Creditor and debtor.

him what the first debtor had done, and saying that if the second debtor did not pay up, the case would be handed to the procurator-fiscal.

*Mackay v. M'Cankie*, 10 R. 537.

But it is difficult to see why the relationship of creditor and debtor should give the former a privilege in charging the latter with crime, not to the authorities, but to the debtor himself. Although A becomes B's debtor, he does not consent to B slandering him, nor has B any interest to do so.

Has person  
having an  
interest in  
another a  
privilege in  
defaming a  
third party to  
him?

The question has never been definitely decided whether a person in the position of a master or superior, or who has an interest in another, is privileged in making statements to that other about a third party. "Whether a master or mistress has a right to defame a third party is a different question. I do not say there is no such privilege. It may be the right or the duty of the mistress of a household to warn the servants against associating with persons of bad character, but injurious statements which may be made for this purpose may or may not be privileged according to circumstances." *p. L. Kinnear*.

*Milne v. Smiths*, 20 R. 95.

Without stating absolutely that no such privilege exists, one is very sceptical about it. A great part of the libels uttered are spoken by people who wish to warn the world against the persons they defame. Yet the good intentions of the utterers do not give them privilege. It is difficult to see why masters should have a privilege of slandering persons to servants, while they do not have it with others.

Privilege of  
dissenting  
church Courts  
in dealing with  
members of  
their churches.

The privilege of masters in speaking of their servants is partly based on the contractual relation or *quasi* contractual relation between master and servant. It is therefore proper here to state the privilege which Church Courts of dissenting churches enjoy in dealing with their members, for it arises out of the contract between them, and not



out of the public law of the land, as in the case of the Courts of the Established Church. The qualified privilege of the latter has been discussed (*supra*, p. 159), and the absolute privilege of both (*supra*, p. 129). Here it is sufficient to note that the Church Courts of dissenting churches, in cases where they have no absolute privilege, may have a qualified one if they have acted within the scope of their functions, though irregularly.

*Edwards v. Begbie*, 12 D. 1134.

(c) In certain cases the law recognises a privilege which is rather attached to the utterances complained of than to the persons making them. This privilege arises in three different cases :—

(c) Privilege arising from nature of the subject matter complained of.

(a) The privilege of fair criticism.

(β) The privilege of fair report.

(γ) The privilege of fair retort.

None of these is a privilege in anything like the same sense as the word has previously been used in. They do not attach to persons in particular positions. They can be pleaded by all. They do not make what would otherwise be actionable not so, nor do they protect persons who have used defamatory expressions from liability, because of the position they occupied when uttering them. These privileges are nothing but equitable concessions to freedom of speech, and they all amount to this, that the law will not allow a person to recover damages from another for something the latter has said or published about him, although it be disagreeable, if the utterance is nothing more than rational liberty of speaking would permit, or common sense would support. These privileges are therefore for the most part to be conferred on defenders by the jury ; for, unless in very clear cases, it is for them to decide whether the utterance complained of is in excess of the rational liberty which is accorded to all of speaking their opinions, or is such as common sense must protect.

(a) Privilege of fair criticism.

(a) The privilege of fair criticism.

In England the privilege of fair criticism is considered not so much as a privilege, but as an instance where the law holds there is no libel. This view was very clearly expressed by the Lords Justices in the recent case of

*Merivale v. Carson*, L.R. 20 Q.B.D. 275.

It is pointed out quite truly that if it was a privilege which protects fair criticism the pursuer would have to prove malice, which would be displaced by the defender proving the honesty of his beliefs as expressed in the criticism. Now all that is submitted to the jury is whether the criticism is fair, and no proof of absence of *malus animus* or of the critic's sincerity will shield him if the jury think the criticism exceeds the bounds of fairness. Thus it was once said by a most distinguished English lawyer—

"That publication, therefore, I shall never consider as a libel which has for its object not to injure the reputation of any individual, but to correct misrepresentation of fact—  
"to refute sophistical reasoning, to expose a vicious taste  
"in literature, or to censure what is hostile to morality."  
*p. L. Ellenborough.*

*Tabart v. Tipper*, 1 Camp. N.P. 350, 10 R.R. 698.

And in Scotland it was remarked—"There are many cases in which the slanderous nature of words is taken away by the circumstances in which they are written or spoken, as in giving the character of a servant . . . or in criticising a literary work. So in discussing the conduct of public men the liberty of the press is a defence." *p. L. C. C. Adam.*

*Hamilton v. Stevenson*, 3 Mur. 75.

Quite recently L. McLaren has pointed out that the Court has a different standard for judging of statements about men in their public life and in their private, and will hold many about them in their public character not defamatory

which would be so if uttered about them in their private relations.

*Waddell v. Roxburgh*, 31 S.L.R. 721.

But it has become so much the habit to talk of the immunity from liability in damages enjoyed by persons criticising matters of public interest as a "privilege," that no apology is here needed for doing so.

The privilege of fair criticism extends then to criticism of all matters of public concern, and of all persons in their public character. Thus it will extend to a criticism of a professor. Limits of this privilege. Criticism of professors.

*Hamilton v. Stevenson*, 3 Mur. 75.

*Aiton v. McCulloch*, 3 Mur. 284.

To the criticism of a proposition made by one's opponents in a controversy. Of opponents in controversy.

*Mullar v. Robertson*, 15 D. 661.

To a criticism published in a newspaper about a book. Of books.

*Davis v. Millar*, 17 D. 1050, 1166.

To criticism on cases in Court. See opinions in Of actions decided in Court.

*Drew v. Mackenzie*, 24 D. 649.

*Gray v. Society for the Prevention, etc.*, 17 R. 1185.

To a harsh and keen article. See L. Neaves.

*Johnstone v. Dilke*, 2 R. 836.

To the discussion of the qualifications of a person for a post for which he is applying. Of qualifications of person for public position.

*Auld v. Shairp*, 2 R. 940.

To a criticism of the suitability of an operatic singer for the rôle she fills.

*Crotty v. M'Farlane*, Glegg on Reparation 501.

To remarks made in the visitor's book of an hotel giving the writer's opinion of the hotel. To invited criticism.

*M'Iver v. M'Neill*, 11 M. 777.

And it of course covers that criticism of public men and affairs which has been discussed *supra*, p. 169, as a privilege of citizenship. It, however, extends to others than citizens. The

inhabitant of a locality has a peculiar privilege over others in freely discussing its affairs and its public men, and can say things which the privilege of fair criticism would not protect ; but all the world may discuss that locality's affairs within the limits of fair criticism.

Does not  
extend to  
criticism of  
private charac-  
ter.

Criticism, if it is to enjoy protection, must " not trench on " the fame and interests of individuals, as these are protected " by their right to claim damages." *p. L. C. C. Adam, p. 290.*

*Aiton v. McCulloch, 3 Mur. 284.*

" There is no privilege when, instead of commenting merely " on the opinions in a publication, or arguing against them, " an opponent takes occasion to calumniate the author." *p. L. Medwyn.*

*Adam v. Allan, 3 D. 1058.*

But the criticism of an opponent's position may go very far so long as nothing is said about his personal character, and therefore it was held not libellous but fair criticism to say that certain statements made by the other side in a medical controversy had been declared to be utterly devoid of truth. *p. L. J. C. Hope.*

*Mullar v. Robertson, 15 D. 661.*

The privilege of fair criticism is undoubtedly narrowed in our law by the liability people incur to be sued for holding up to public ridicule, hatred, and contempt. The result is that criticism to be protected must not merely be fair, but must also be serious, and any one using the keenest weapons of criticism runs the risk of not being protected.

Question of  
fairness of  
criticism  
usually sent to  
a jury.

Sometimes the Court decides itself in clear cases that the utterance complained of is privileged as being fair criticism, and at once assails the defender.

*Gray v. Society for Prevention, etc., 17 R. 1185.*

*Crotty v. M'Farlane, Glegg on Reparation 501.*

In most cases, however, the case is sent to a jury for them

to decide whether the comment is fair or not. In these cases it is not usual to put in issue whether the statements were maliciously uttered. Such a question is only proper when the Court has decided that the case is one of privilege, and not for cases where that question has not been decided before they are sent to the jury.

*Davis v. Millar*, 17 D. 1050.

See issue in

*Johnstone v. Dilke*, 5 R. 836.

(β) It has been shown above (p. 139) that in certain cases the publishers of reports enjoy absolute privilege. When absolute privilege does not exist, it may be questioned whether reports have any privilege at all attached to their publication. Yet it seems reasonable that in an age of publicity, reports of public proceedings, and on matters of public concern, should, when published, not render the publishers liable in damages. In England this has been recognised by statute, and it is provided by

(β) Privilege of fair report.

51 & 52 Vict. c. 64.

S. 4. "A fair and accurate report published in a newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above mentioned bodies, or of any meeting of any commissioners authorised to act by Letters-Patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justices of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police, or

"chief constable of any notice or report issued by them for the information of the public, shall be privileged unless it shall be proved that such report or publication was published or made maliciously. Provided that nothing in this section shall authorise the publication of any blasphemous or indecent matter. Provided also that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report or other publication complained of appeared, a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same. Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern, and the publication of which is not for the public benefit.

"For the purposes of this section, 'public meeting' shall mean any meeting *bona fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted."

How far this privilege extends in our law is not clear.

In Scotland we have no statute to fall back upon, and the state of the common law is not clear. In an old case it was held that newspapers are not privileged to communicate to the public any private transaction, however certain their information may be. They must confine themselves to what is publicly transacted, and what must spread of course without a newspaper.

*Finlay v. Ruddiman*, M. 3436.

Probably gives protection to reports of what is publicly transacted.

It would seem as if the latter part of this ruling recognised a right and consequently a privilege in newspapers to communicate "what is publicly transacted," and if so, the case

establishes as our common law very much the same rule as the English statute's. It has, however, to be borne in mind that the law has never recognised a plea that the matter complained of is common report, as giving a person sued a privilege to utter it. Such a plea might go in mitigation of damages, but would not entitle the person pleading it to be absolved from liability in damages for the statement unless it were proved that he uttered the statement maliciously. But the question now under discussion is somewhat different. It is whether, if statements made in public on matters of public concern are reported fairly and accurately, or if documents on matters of public concern are published, the reporter or publisher is privileged. The case of *Finlay* seems to support the view that he is. Such a view is eminently in consonance with common sense and the spirit of the age. If at a public meeting of 4000 people A in his speech attacks B, the attack will probably be the part of the speech most discussed by the 4000 people, who will talk of it everywhere, spreading the attack far and wide. B would probably never dream of suing any one of the 4000 auditors who have made the attack on him common talk, and who are probably deeply interested in the matter, and if he did, it is difficult to see what success his action could possibly have. Why should a newspaper, then, which publishes a report of A's speech, be made a scapegoat of? Its precise report will probably be far less injurious than the distorted, hazy, and inaccurate versions given orally by the auditors. The only other case in our books which turns on the privilege of a fair report is that of

*Farishes v. Davidson*, Hume 634.

In that case Davidson, having had some articles stolen from him, caused his servant Carruthers to be arrested. The latter, while in custody of a constable, and in presence of several persons, said that two brothers, the Farishes, had com-

mitted the theft. Davidson told some persons what Caruthers had said, and thereupon the Farishes sued Davidson for damages. The Court, however, refused them a proof, and assolizied Davidson. This is a very strong case for holding a fair report on matters publicly transacted privileged. It goes further than necessary for the proposition now being maintained. But it certainly makes it difficult not to hold that a fair and accurate report of matters of public concern is privileged.

All things publicly transacted are not matters of public concern.

In the English Act it will be noticed that the protection is not to be afforded to the publication of any matter "not of public concern, and the publication of which is not for the public benefit." Questions have been raised whether a report to lose the privilege must be wanting in both these elements, or whether it will lose it if wanting in only one. Such questions are not very practical, for if a matter is of public concern it is difficult to see how it will not be for the public benefit to publish it, and *vice versa*. But it is worthy of notice that all things publicly transacted may not be held to be of public concern. Thus a jury found that the report of interruptions to a speech on a public matter, the interruptions not having reference to the matter, but to the speaker, was not a public concern and for the public benefit.

*Kelly v. O'Malley*, 6 Times L.R. 62.

But the simple rule would seem to be to afford qualified privilege to fair reports of all proceedings which members of the public could have witnessed, had they been present.

What are matters of public concern?

It is difficult to lay down what are matters of public concern, but they certainly would include all the meetings and matters enumerated in the English Act, though they might not include everything done at or in connection with them.

(γ) The privilege of fair retort.

(γ) The privilege of fair retort. It was distinctly laid down that if charges are made against a person he is privi-



leged to retort in as public a way as the charges were made, so long as the statements in the retort are true.  
*p. L. Shand.*

*Gray v. Scottish Society for Prevention, etc.*, 17 R. 1185.

As stated above, this privilege would be practically unimportant, because so long as the statements made in retort are true, they are absolutely privileged like any other statements. But the privilege of retort may be somewhat differently stated. It will protect a man who, when charges are made against him, replies to them as publicly as they were made, and sets forth facts relative to the charges, or criticises pertinently the charges made, or discusses the conduct of the person making the charges, relatively to the making of them, but not relatively to other matters. In other words, the retort must be made in the proper quarter, and must be pertinent to the subject of controversy and must not refer to other matters or the private life and affairs of the person to whom the retort is addressed.

*Laughton v. Bishop of Sodor and Man*, L.R. 4 P.C. 495.

Thus it was held that a professor in replying to remarks made about his chair to the patrons of the University was not entitled to retort, not only to the patrons and *Senatus Academicus*, to whom he would have been privileged in replying, but also to his students and outsiders.

*Hamilton v. Duncan*, 4 S. 414.

And a tenant replying to his landlord to certain charges made against him by the factor, is not privileged to bring general charges of neglect of duty, etc., against the latter.

*Munro v. Munro*, Hume 616.

And when M had charged W in the newspapers with having supplied a cheaper coffee than what he had contracted to supply to a public institution, W was held not, at any rate *prima facie*, privileged in not merely saying that

this statement was a lie, but also that other statements made by M of other people were lies also.

*Milne v. Walker*, 21 R. 155.

On the other hand, where an artist whose pictures had been sold by auction sent a circular round to the purchasers, saying that the auctioneer had sold the pictures under upset price, the auctioneer was held privileged in issuing another circular saying that this statement was "absolutely untrue."

*Brodie v. Dowell*, 2 S.L.T. 9.

Question  
whether retort  
was fair may  
be decided by  
Court.

If the privilege of retort is clear upon the record, the case will be disposed of by the Court, as in

*Gray v. Society for Prevention, etc.*, 17 R. 1185.

*Brodie v. Dowell*, 2 S.L.T. 9.

But when it is not clear on record the case will be sent to a jury, and it may be for them to decide whether in the circumstances the retort complained of was a fair and reasonable one.

Privilege of  
answer.

Very closely allied to the privilege of retort is that afforded to persons who in answer to a request made by persons entitled to make it, state their reasons for refusing it. This privilege was granted in

*Dixons v. Murray*, 1 S.L.T. 494,

to an Inspector of Poor, who, on being requested by the step-parents of a child under his charge, to deliver it to them, wrote in reply a letter animadverting on their past conduct towards it.

Agent privi-  
leged where  
principal is.

It must be noted that it was held that an agent is privileged in disseminating what his principal is privileged in uttering.

*Torrance v. Leaf*, 13 S. 72.

Extent of pro-  
tection  
afforded by  
qualified  
privilege.

*Second.* What protection does qualified privilege give? While absolute privilege gives a complete immunity to persons against liability for damages for what they have uttered when protected by it, qualified privilege only gives

the immunity when the person complaining of the statements fails to prove that they were uttered maliciously, and, in some circumstances, without probable cause. The protection, therefore, which qualified privilege gives to a person is that the pursuer must prove that the defender made the statement maliciously, and not in the exercise of a right or the performance of a duty, and, in certain circumstances, the pursuer must also prove that the person made the statement without probable cause. In the ordinary case of a person not enjoying privilege, the law presumes, it used to be said, from the mere fact that the utterance is defamatory, that it was uttered maliciously; and even if the utterer had some probable cause for making it, that will not shield him from liability, though it may be a fact which will tell towards mitigation of damages. "Every lawyer knows that malice, " or the *animus injuriandi*, is of the essence of the charge, " and the law lays down two cases. In the first or privileged " cases the presumption of law is that the statement is made " not *animo injuriandi*, but in the exercise of the privilege, " as a master in giving a character of a servant, or a counsel " in stating his case, and in these cases law lays on the " pursuer the proof that the statements proceeded from *malus* " *animus*. This is one of the cases that are not privileged, " and in all of them the rule is equally clear that malice or " the *animus injuriandi* is not necessary, but that falsehood " and injury is all that it is necessary to prove." *p. L. Pitmilley*.

Malice, and in certain cases want of probable cause, must be proved by party complaining.

*Tytler v. Macintosh*, 3 Mur. 236.

"There are many protected cases, and in these it is necessary to state malice . . . but when there is no protection the law infers malice from the falsehood and calumny." *p. L. C. C. Adam*.

*Alexander v. Macdonald*, 4 Mur. 94.

But the malice which is said to be presumed in non-

privileged cases is a mere fiction, and no such presumption is required to make a good legal claim for damages. The malice which requires to be proved in privileged cases is, on the other hand, no fiction, but is a most necessary element in giving the pursuer a right to damages.

These must be  
averred on  
record.

According to our procedure a pursuer suing a person who enjoys privilege, or who may possibly be found to have privilege, must aver on his record that the person made the statement maliciously, and also, in the cases where it is necessary to prove want of probable cause, that he made it without probable cause. If he does not do so, and the case is one where the defender is obviously privileged, or if at the trial it turns out that the defender was privileged, the defender will prevail.

*Chiene v. Archibald*, 6 S.L.R. 62.

The reason for this is that the pursuer will not be allowed to prove what he has not averred. If, therefore, in a case where on the record it is obvious that the defender uttered the statement when privileged, the pursuer does not aver malice (and, if need be, probable cause), he has not stated a case which if proved would entitle him to a verdict. If on the record it is not obvious that the defender had a privilege in uttering the statement, and the case goes to trial, and at the trial it turns out that the defender was privileged, the pursuer cannot prove that the defender acted maliciously (and, if need be, without probable cause) unless he has averred so on record, because he has never offered to make this part of his case and given the defender warning that he might do so.

*Fenton v. Currie*, 5 D. 705.

If, however, the pursuer has not averred malice on record, and the defender at the trial is shown to have been privileged, and the pursuer without objection then leads evidence of malice without opposition from the defender, the latter

bars himself from asking for a new trial, on the ground that malice was not averred on record.

*Ritchie v. Barton*, 10 R. 813.

If the privilege of the defender is obvious on the record, and the pursuer has duly averred malice (and, if need be, want of probable cause), the pursuer must in the issue to be laid before the jury ask not only whether the statements were made "falsely and calumniously," but also whether they were made "maliciously" (and, if need be, without probable cause). *p. L. J. C. Hope*.

*M'Intosh v. Flowerdew*, 13 D. 726.

But if the privilege of the defender is not obvious on the record, malice and want of probable cause need not go in issue.

*Dunbar v. Stoddart*, 11 D. 587.

*Reid v. Coyle*, 19 R. 775.

But if at the trial the defender is shown to have been privileged, the pursuer will be allowed to lead evidence of malice on his part (and, if need be, of want of probable cause), if they have been averred on the pursuer's record. See *L. Ardmillan*.

*M'Bride v. Williams*, 7 M. 427.

*Rankine v. Roberts*, 1 R. 225.

*Ingram v. Russell*, 20 R. 771.

Whether the defender is privileged or not is generally a question of law for the Court and not one for the jury.

Privilege or  
no, usually a  
question for  
the Court

*p. L. Moncreiff* 1150—*Torrance v. Leaf*, 13 S. 1146.

*p. L. Medwyn*—*Fenton v. Currie*, 5 D. 705.

But there are certainly cases when the matter is left to the jury. These are for the most part cases where the privileges of criticism and of retort are claimed. In them the Court may leave it to the jury to decide whether the criticism or retort is such as should be entitled to protection.

Pursuer's  
averments  
alone regarded  
in deciding  
if there is  
privilege.

The Court, in judging whether there is privilege or not, will look solely at the statements on the pursuer's record.

*Lockhart v. Cumming*, 14 D. 452.

Thus if the pursuer states that the alleged libel was uttered in judicial proceedings, he is held to admit that the occasion was privileged *prima facie*. *p. L. J. C. Hope*.

*M'Intosh v. Flowerdew*, 13 D. 726.

And so also when it clearly appears that the utterance complained of was made by a person in one or other of the various privileged positions before enumerated, the defender will be held by the Court to have been privileged. But if the pursuer states that the relationship between him and the defender, out of which, if it existed, the privilege would arise, had been severed before the uttering of the libel, privilege will not generally be presumed by the Court to exist.

*Skinner v. Dunbar*, 11 D. 945.

But this rule would obviously not apply to the case of an ex-master giving to a person interested a character of his ex-servant.

*Farquhar v. Neish*, 17 R. 716.

Privilege held  
to exist may be  
displaced at  
trial.

Although the Court hold that, on record, a case of privilege is *prima facie* made out, and that consequently the pursuer must go to trial on an issue whether the defender made the statement "maliciously" (and, if need be, without probable cause), "the pursuer may very soon in the progress of the cause destroy the privilege by showing that the slander complained of was not in any rational view relevant and pertinent to the matter of the action," if the privilege pleaded is that of judicial slander. *p. L. J. C. Hope*.

*M'Intosh v. Flowerdew*, 13 D. 726.

Defender  
pleading privi-  
lege must state  
on record facts  
on which it  
arises.

So that the decision of the Court on the record, that the case is *prima facie* one of privilege, is not final, and may be overcome.

On the other hand, if the defender pleads privilege, he

must set out in his defences the facts on which he bases his claim to it, unless they are clear on the pursuer's record.

*Smith v. Green*, 15 D. 549.

And he cannot plead it unless he either admits the use of the words complained of or states the words he actually used.

*Fraser v. Wilson*, 13 D. 289.

This last decision may, however, be doubted. A pursuer has only to plead with respect to the words complained of. If he never uttered them his proper plea is a denial, and not that he was privileged in uttering other words not founded on.

If the defender at the trial proves that he was privileged in uttering the words complained of, the pursuer will be allowed to lead additional evidence in replication to prove malice if he has averred malice on record.

*Rankine v. Roberts*, 1 R. 225.

Before dealing in detail with the requisites in averring malice, it will be convenient first to enumerate the instances when in privileged cases it is necessary to aver want of probable cause as well as malice in the utterer, for when they are known, all other privileged cases only require an averment of malice. "Probable cause" is a defence proposed by a person who is sued in "an action of damages in consequence of having given information to the public authorities, or for setting the authorities in motion, the most ordinary instance being information of crime given to the police or procurator-fiscal. The defence of probable cause has been extended to cases of prosecution under the Customs and Revenue Acts; but it would never be competent to a master in an action against him by a servant, or in any case where there was anything of the private relation of duty between the person said to have uttered the slander and the person to whom it was addressed." *p. L. M'Laren*.

*Milne v. Smiths*, 20 R. 95.

And must either admit the words, or state those he used.

Defender proving privilege, pursuer may lead evidence to prove malice.

When want of probable cause must be averred and proved.

And from the case of

*Gibb v. Barron*, 21 D. 1099,

it seems clear that want of probable cause need only be put in issue where the language complained of is used in the exercise of a public duty, or when the user is acting in a judicial, administrative, or other public capacity. A person is not in one of these positions when he answers on being precognosced by members of a dissenting kirk session in a cause before that session, he himself not being a member of the kirk.

Want of probable cause must therefore be averred when the statements complained of have been made

(a) (a) Against persons for utterances made in discharge of official duties. Magistrates.

(a) (a) By persons who occupy official positions, and who have made the statements pertinently or relevantly to any matter falling within the scope of their official duties. Thus it must be averred and proved in an action against a magistrate for taking (as was alleged), partially and irregularly, and transmitting to the Lord Advocate, a precognition for a criminal offence of which the pursuer was accused.

*Harper v. Robinsons*, 2 Mur. 383.

Procurators-fiscal.

And also in an action against a procurator-fiscal for statements made by him in the course of his duty. Thus Lord Eldon, in giving judgment in

*Arbuckle v. Taylor*, 3 Dow 160,

after stating that he considered the English and Scottish law the same on the matter, continued: "I conceive that by the law of England an action for a malicious prosecution cannot be supported unless it is proved to the satisfaction of the jury that it was malicious, and that it was without probable cause. It has been stated, and I think correctly, that admitting it to be malicious, yet if there was probable cause for it, the verdict cannot be for the plaintiff, and that admitting it to be without probable



“ cause, if it was not malicious, the verdict cannot be for the  
 “ plaintiff, the fact of the want of probable cause, however,  
 “ being to be considered as evidence of the malice. But still  
 “ it is but evidence, and if the jury should conclude upon the  
 “ whole that there was not malice, such an action cannot be  
 “ maintained. And the reason is this, that if there be prob-  
 “ able cause for the prosecution the policy of the law requires  
 “ that men should be protected who bring forward accusations  
 “ founded on probable cause, and it would be a great deal too  
 “ much to say that every prosecution which failed, though  
 “ there should be ever so much probable cause for it, must be  
 “ considered as a prosecution for which the prosecutor is  
 “ liable in damages. The law therefore protects the prosecutor  
 “ unless you can say that he has acted maliciously, and that  
 “ there was no probable cause for his proceeding.” And see  
 the cases of

*Craig v. Peebles*, 3 R. 441.

*Nelson v. Black*, 4 M. 328.

It must also be averred against constables arresting a girl on  
 a charge of importuning.

Constables  
arresting  
people.

*Young v. Magistrates of Glasgow*, 18 R. 825.

And it must also be set first on record and proved in an  
 action against a Church Court when it has acted as prosecutor.

Church Courts  
acting as  
prosecutors.

*Smith v. Presbytery of Auchterarder*, 12 D. 296.

(β) It was stated by the L. J. C. Macdonald that want of  
 probable cause must be averred and proved in actions  
 founded on judicial slander,

(β) Probably  
not required in  
actions for  
judicial  
slander.

*Selbie v. Saint*, 18 R. 88 ;

but the remark was *obiter*, and not necessary for the judgment  
 in the case, and is contrary to the express decision of the  
 Court on the matter in

*Bayne v. Macgregor*, 24 D. 1126.

which must therefore be held as the ruling decision on the  
 point.

(γ) In actions for statements made to the authorities in exercise of public rights or performance of public duties. Complaints made to Parochial Boards or Board of Supervision.

(γ) Want of probable cause must also be averred and proved in actions founded on statements made by persons in the exercise of their rights or duties as citizens, when the statements are made to the authorities whose duty or interest it is to be informed on the matter. Thus it must be averred and proved in an action against a minister for writing to the Parochial Board and the Board of Supervision about the fitness of the pursuer to take charge of pauper children who had been committed to his care.

*Croucher v. Inglis*, 16 R. 774.

Statements made to a Government department.

And in an action against a person for statements made to a Government department about matters over which it has control.

*Rogers v. Dick*, 1 M. 411.

Charges made to the police.

It must also be averred and proved when a person complains that another has made a charge against him to the police, or has wrongously caused him to be apprehended.

*Douglas v. Main*, 20 R. 793.

*Urquhart v. Mackenzie*, 14 R. 18.

*Hassan v. Paterson*, 12 R. 1164.

*Lightbody v. Gordon*, 9 R. 934.

*Thomson v. Adam*, 4 M. 29.

*Ferguson v. Colquhoun*, 24 D. 1428.

*Page v. Buchan*, 17 D. 1079.

*M'Pherson v. Cattanach*, 13 D. 287.

And it must be averred and proved where the action is against a medical man for making statements to a detective officer who is making enquiries into the death of a person.

*Reid v. Coyle*, 29 S.L.R. 638, 19 R. 775.

(δ) Sometimes in actions for statements made by a superior about his subordinate.

(δ) Proof of want of probable cause has in one instance been required by the Court in a case where the statement was made by a person in the position of master or superior to the pursuer, about the pursuer's behaviour as servant or inferior.

*Hill v. Thomson*, 19 R. 377.

There were peculiarities about this case which may justify its being taken out of the ordinary rule, which certainly is that in such cases want of probable cause for the statement complained of does not require to be proved. In the case of *Hill*, the statement complained of was an entry made by a captain of a ship in the log-book of breach of discipline by the pursuer, a sailor on the ship. By the Merchant Shipping Act, the captain is bound to make entries in his log-book of breaches of discipline. The decision in this case can therefore be justified on the ground that the captain in doing what he did was acting in office as prescribed by law. It would also seem that if a subordinate official sues his superior officer for anything said by the latter in discharging his duty, the pursuer must aver want of probable cause. See

*M'Murphy v. Campbell*, 14 R. 725.

It must also be noted that in one case where the privilege arose out of the contractual relation between the parties, the Court seemed to think that want of probable cause or its equivalent must be proved. This was the case of

*Edwards v. Begbie*, 12 D. 1134,

where a vestryman sued his minister and vestry for defamation in expelling him from the vestry. This, however, was a case where the vestry acted in a *quasi* judicial character, and the decision may be justified on that ground.

What will constitute want of probable cause is for the judge and not for the jury to decide. *p. L. Kinloch*.

*Urquhart v. Dick*, 3 M. 932.

*Craig v. Peebles*, 3 R. 441.

And if on the face of the record it is obvious that the defender had probable cause in making the statement complained of, the action will be thrown out by the Court, and the defender assolizied.

*Craig v. Peebles*, 3 R. 441.

What will constitute want of probable cause is for the Court to decide.

Slight evidence sufficient to displace probable cause.

"Slight evidence will be sufficient to shift the burden of proving probable cause on the defender." *p. L. J. C. Boyle*.

*Hallam v. Gye*, 14 S. 199.

But the defender can prove probable cause without a counter issue.

*Keay v. Wilsons*, 5 D. 407.

Substitutes for an averment of want of probable cause.

Occasionally a pursuer has sought to substitute other words in lieu of "without probable cause," as equivalent to them, in his averments against the defender. It has been decided that "groundlessly" is not an equivalent.

*Cameron v. Hamilton*, 18 D. 423.

But in an action against the minister and vestry of an Episcopal Church for expelling a vestryman, the pursuer was allowed to substitute "in violation of their duty as vestry-men and minister of the congregation" for "maliciously" and without probable cause."

*Edwards v. Begbie*, 12 D. 1134.

Distinction between want of probable cause and malice.

Want of probable cause is clearly distinguishable from malice. See *L. J. C.*

*Stewart v. Sproat*, Poor Law Mag. 1858.

It is a negative feature, and consists of the absence of any reasonable ground or occasion for the making of the statement complained of. Malice, on the other hand, is a positive feature, and its legal meaning has often been defined. Thus, *L. Jeffrey* defined it as "such animosity, ill temper, love of scandal and gossip, or mere rash and thoughtless loquacity" as induces a man to forget what is due to the fair fame of "his neighbour, and to use words by which his feelings and reputation may be injured." And in the same case *L.L. Cockburn* and *Ivory* defined it as "such impropriety as implies violation of duty."

Definitions of malice.

*Adam v. Allan*, 3 D. 1058.

*L. Mackenzie* says, "Under malice I would include gross recklessness—*culpa lata quæ equiparatur dolo*. Malice in

" a wide sense imports not only a bad motive, but the want  
 " of any good motive. There need not be both, because want  
 " of probable cause may be a good ground for inferring malice."

*Callendar v. Milligan*, 11 D. 1174.

L. Ivory says, "The malice to be proved does not require to  
 " be special malice. A general temper of mind such as that  
 " here conceived by the defender, who had evidently lost all  
 " self-control, was sufficient."

*McDonald v. Ferguson*, 15 D. 545.

L. Fullerton says, "Malice does not imply a deep and de-  
 " liberate desire to injure, but a reckless disregard of the  
 " comfort of others."

*Smith v. Green*, 16 D. 549.

L. Deas says, "Gross recklessness and *culpa lata* are  
 enough" to constitute legal malice.

*Cameron v. Hamilton*, 18 D. 423.

Again he says, "Malice in the legal sense does not neces-  
 " sarily imply actual personal malice, but only such recklessness  
 " or gross carelessness and (it may be) ignorance, as the law  
 " holds to be utterly inexcusable, and consequently applies  
 " thereto the maxim, *culpa lata equiparatur dolo*."

*Urquhart v. Grigor*, 3 M. 283.

L. Ardmillan says, "You may infer all the malice which the  
 " law requires from such extreme recklessness as amounts  
 " to *culpa lata*."

*Bayne v. MacGregor*, 1 M. 615.

L. Gifford says, "I think malice, in cases like the present,  
 " has this wide meaning, that it includes every motive ex-  
 " cept the honest and pure wish fairly and sincerely to dis-  
 " charge a duty."

*Auld v. Shairp*, 2 R. 940.

It is not sufficient, however, for a person who complains  
 of the privileged utterances of another, merely to aver that  
 they were uttered "maliciously." He must further state

Facts and  
 circumstances  
 from which  
 malice may be  
 inferred must  
 be stated on  
 record.

some facts and circumstances from which, if they are proved, it would be possible to infer that the utterance was maliciously made. "I may say that it has always been a fixed idea in my mind that it is not enough to use the word 'malice' or 'maliciously,' to make a relevant case of malicious slander, but that a circumstantial case of some kind must be set forth. But what would amount to a relevant averment in the present case is very different from what would be required in a case, say, of judicial slander. The kind of facts would vary with the circumstances of each case, the question being one of degree rather than one of a distinct and separate principle or criterion of relevancy." *p. L. M'Laren.*

*Ingram v. Russell*, 20 R. 771.

Three classes of facts and circumstances.

L. Jeffrey gives three classes of facts and circumstances from which malice may be inferred—(1) Extrinsic evidence, or direct indications of an *animus injuriandi*; (2) the impertinence of the words to the lawful discussion which is alleged to have given occasion to them; (3) the mere violence, intemperance and palpable excess of the words themselves.

*Adam v. Allan*, 3 D. 1058.

Malice may be inferred from impertinence or irrelevance of statement or the excess of the language.

With regard to (2) and (3) it is certain that malice may sometimes be inferred merely from the excess of the statements made, or the circumstances in which they were uttered. Thus, it was the opinion of the Court that certain accusations may be so bad as to infer *dolus malus* in themselves, as when a man charges another with adultery and has no evidence to prove it, though the charge be made in an action against the accuser's wife for adultery.

*Graeme v. Cunningham*, M. 13923.

And LL. Cockburn and Ivory stated that malice might be inferred from the mere "intensity of the language."

*Adam v. Allan*, 3 D. 1058.

The Lord Chief Commissioner Adam laid it down that

malice may be proved either from the false and calumnious nature of the libel, or by direct evidence.

*Alexander v. Macdonald*, 4 Mur. 94.

"It cannot be held that nothing but direct and positive proof of malice, altogether apart from and independent of the case itself, can avail; on the contrary, I think that while it is competent to prove by separate, distinct, and (as it is sometimes termed) extrinsic evidence, independent of the case itself, that the defender was influenced by malice; it is also competent to require the jury to take into their consideration the whole circumstances of the case itself, with the conduct of the party in relation to time, place, and, in particular, the pertinency of his words to the subject matter of the privilege, and to decide, if there is sufficient evidence of malice resulting from a general view of these circumstances." *p. L. J. C. Boyle*, p. 338.

*Hamilton v. Hope*, 2 F.D. 325.

"It is not necessary that there should be proof of extrinsic facts to induce you" (the jury) "to conclude that it" (the statement) "was malicious. It is sufficient if you are satisfied of it from the nature of the words and the concomitant circumstances." *p. L. Moncreiff*.

*Torrance v. Leaf*, 13 S. 1146.

Again, it was laid down in

*Aitken v. Dudgeon*, 3 Mur. 227,

that direct proof of malice is not required, as it may be inferred from the facts and circumstances in which the statement was uttered.

But when malice has to be proved by extrinsic evidence or direct indications of an *animus injuriandi*, then the pursuer must carefully set out on record the extrinsic facts and circumstances which he offers to prove in evidence of malice. Thus, in an action against a member of the Board of Customs for having made false complaints against the pursuer, owing

Malice  
proveable by  
extrinsic  
evidence.

to which he was dismissed from his post under the Board, the Court ordered a special condescendence of facts and circumstances from which malice might be inferred.

*Boyd v. Reid*, Hume 610.

Again, it was observed that as the circumstance of defamatory words being used *in judicio* affords *prima facie* evidence against malice, special facts inferring malice must be proved.

*Davidson v. Megget*, 1 S. 3.

Lord Ardmillan once laid it down that "where malice is "meant to be alleged as a special quality of the act complained of, apart from inferences from the act itself, there "should be some distinct statement of facts to explain the "grounds from which such malice is to be inferred."

*Urquhart v. Grigor*, 3 M. 283.

Again, it has been laid down that facts and circumstances from which, if proved, malice might be inferred, must be averred in an action founded on statements made in judicial proceedings,

*Scott v. Turnbull*, 11 R. 1131,

or by public officials.

*M'Murphy v. Campbell*, 14 R. 725.

*Innes v. Adamson*, 17 R. 11.

*Young v. Magistrates of Glasgow*, 18 R. 825.

Or in a letter from a client to his agent. *p. L. Kyllachy*.

*Williamson v. Umphray*, 17 R. 905.

The late Lord President Inglis held that this necessity to aver facts and circumstances from which, if proved, the alleged malice might be inferred, only existed when the statements were made in judicial proceedings, or by or to a public authority.

*Laidlaw v. Gunn*, 17 R. 394.

But this rule has not been universally followed, and does not seem to rest on any clear and justifiable ground. See *L. Lee*.

*Farquhar v. Neish*, 17 R. 716.

*M'Fadyen v. Spencer*, 19 R. 350.



The facts and circumstances, apart from the nature of the language used (*supra*, p. 202), from which, if proved, malice may be inferred, are very various, and it is only possible to give a few of the many conceivable number.

Facts and circumstances extrinsic of the case from which malice may be inferred.

(1) The untruth of the statement, coupled with no reasonable ground for making it, is some ground from which to infer malice.

(1) Untruth of statements.

*p. L. Young—Shaw v. Morgan*, 15 R. 865.

*p. L. Young—Green v. Chalmers*, 6 R. 318.

*Anderson v. Wishart*, 1 Mur. 429.

But the mere inaccuracy of the statement is not in itself a sufficient evidence of malice. *p. L. J. C. Macdonald.*

*M'Lean v. Adam*, 16 R. 175.

(2) Want of probable cause is some evidence of malice.

(2) Absence of probable cause.

*p. L. Eldon—Arbuckle v. Taylor*, 3 Dow 160.

*p. L. P. M'Neill—M'Donald v. Ferguson*, 15 D. 545.

*Callendar v. Milligan*, 11 D. 1174.

(3) "The absence of all precautions with a view to secrecy, the repetition of the offensive statements after an enquiry which might have tended to allay suspicion, or at least to induce caution, and the broad and unqualified language" in which the statements were made, are sufficient elements to raise a presumption of malice. *p. L. M'Laren.*

(3) Absence of precautions for secrecy.

*Ingram v. Russell*, 20 R. 771.

(4) An averment of constant repetition of the defamatory statement is one which, if proved, may justify an inference of malice.

(4) Frequent repetition.

*Douglas v. Main*, 20 R. 793.

*Stuart v. Moss*, 13 R. 299.

*Ritchie v. Barton*, 10 R. 813.

*Logan v. Weir*, 10 S.L.R. 22.

*M'Dougal v. Campbell*, 6 S. 742.

And the circulation out of Court of a defamatory pleading may also justify an inference of malice.

*Swinton v. Taylors*, 1 S. 59, 2 S. App. 245.

(5) Previous expressions of ill-will.

(5) The fact that the defender had made use of previous expressions of ill-will may justify an inference of malice.

*Keay v. Wilsons*, 5 D. 407.

*Newlands v. Shaw*, 12 S. 550.

(6) Previous unsuccessful actions by defender against pursuer.

(6) The fact that the defender had raised previously unsuccessful actions against the pursuer may be one from which malice may be inferred. *p. L. J. C. Moncreiff*.

*Gordon v. British & Foreign Metaline Co.*, 14 R. 75.

(7) Reckless utterance of the defamatory statement.

(7) The fact that the statement was made wantonly, recklessly, against or without knowledge, is sufficient to justify an inference of malice. *p. L. C. C. Adam*.

*Forteith v. E. of Fife*, 2 Mur. 477.

*Denholm v. Thomson*, 8 R. 31.

(8) Impertinence of statement.

(8) In judicial slander malice may be inferred from the fact that the statement was not pertinent to the action in which it was made.

*M'Intosh v. Flowerdew*, 19 D. 726,

or that it was made outside the cognisance of the Court in which it was uttered. *p. L. Kyllachy*.

*Williamson v. Umphray*, 17 R. 905.

L. J. C. Inglis seems to have considered proof of impertinence of the statements as different from proof that they were maliciously made. See his opinion (p. 226) in

*Mackellar v. D. of Sutherland*, 21 D. 221.

But probably the more correct way to look at it is to regard it as proof of malice.

But it is not evidence of malice that the defender, when he discovered that the statements he had made on record were false, did not take vigorous steps to withdraw them.

*Moscip v. M'Caig*, 10 S.L.R. 140.

This case, however, hardly seems reconcilable with

*Bell v. Black*, 38 Scot. Jur. 412,

where it was held that the fact that the defenders had allowed a libellous statement to remain on record, although they had

not authorised its being put there, was a fact, along with others, from which malice might be inferred.

The fact that a petitioner appears in support of his petition to a Court, such as a Licensing Court, is not proof of malice.

*Keay v. Wilsons*, 5 D. 407.

But the fact that a man had special opportunities of knowing the truth or falsehood of averments he makes in judicial proceedings is a circumstance from which malice may be inferred.

*Black v. Brown*, 5 S. 508.

(9) A mere averment that the defender had changed his attitude to the pursuer, and had written to the proper authorities stating that the pursuer was unfitted for the post for which he was a candidate, and that the defender had held on to that post to prevent the pursuer from getting it, is not a sufficient averment from which to infer malice.

(9) Mere change of attitude by defender to pursuer not evidence of malice.

*Auld v. Shairp*, 2 R. 940.

(10) "I do not doubt the propriety in some cases of inferring the existence of malice at one date from proof of something showing malice at a later date. Malice generally exists for a longer or shorter period before it finds expression in words or actions. Thus, if a man makes a statement on one day and is found voluntarily and perhaps somewhat recklessly repeating it on a subsequent occasion in such circumstances as to infer malice, that proved malice may not unreasonably be carried back so as to affect the first statement." *p. L. Trayner*.

(10) From subsequent events.

*Reid v. Coyle*, 30 S.L.R. 335.

(11) The proof of malice need not be direct evidence of ill-will. *p. L. P.*

(11) A number of slight circumstances.

*Bayne v. MacGregor*, 1 M. 615.

It may be a "number of slight circumstances concurring in one direction which may be more calculated to convince" the jury "than one very strong circumstance." *p. L. Benholme*.

*Bell v. Black*, 38 Scot. Jur. 412.

And thus the addition to statements, which are privileged, of others which are not, may be proof of malice, taking away the privilege from those which are.

*Lockhart v. Cumming*, 14 D. 452.

(12) Malice in agent not proof of malice in principal.

(12) Proof of malice in an agent is not necessarily proof of malice in the principal.

*Mackellar v. D. of Sutherland*, 24 D. 1124.

Malice is attributable to a copartnery.

But malice can be attributed to a copartnery. See *L. Rutherford-Clark*.

*Gordon v. British & Foreign Metaline Co.*, 14 R. 75.

Although the same judge doubted whether it can be attributed to a public board.

*Macaulay v. N. Uist School Board*, 15 R. 99.

Substitutes for an averment of malice.

Sometimes a pursuer is allowed to substitute other words for an averment of malice. Thus, in an action against a clergyman for an excommunication pronounced by him, the words "in violation of his duty as a minister" were inserted in the issue in place of "maliciously."

*Dunbar v. Stoddart*, 11 D. 587.

Defender always privileged in actions for verbal injury.

There appears to be no room for a plea of privilege—at least of qualified privilege—in an action founded on verbal injury. *p. L. P. Robertson*.

*Paterson v. Welch*, 20 R. 744.

The reason of this is obvious. The defender in such cases really is from the first in a position of privilege. The law might be otherwise stated, and the proposition put forward, that in actions for verbal injury, the defender is always privileged; for it is only by the pursuer proving intention to injure, or perhaps, more correctly, want of lawful occasion in the defender for making the statement complained of, that the pursuer can succeed in his action.

## CHAPTER XVIII

### ISSUES

Actions for defamation sent to juries—Issues—Grounds for refusing issue—

Defect in pursuer's record—No issuable matter: (1) If words not defamatory *per se*; (2) If uttered in *rixa* or retort; (3) If not reasonably innuendoes—General form of issue—Requisites of issues: (1) Must charge defender with uttering defamatory matter in some way; (2) Must set forth words complained of; meaning and effect in issue of "or other words to that effect"; words uttered in foreign language; separate issues not needed for each defamatory utterance complained of; (3) Must be specific as to time, place, and persons; latitude allowed; apparent exception to requirement of specification; (4) Must contain innuendo if one is required; alternative innuendoes; forms of innuendoes in issues; innuendo within innuendo; innuendo in actions for holding up to contempt; (5) If case privileged, malice, and, if need be, want of probable cause must go in issue; substitutes for "maliciously" and "without probable cause" in issues; in actions against ministers; in actions against medical men—Issues where two pursuers or defenders—Issues where person sued for defamation uttered by another on his behalf—Examples of issues: I. Simple issues in unprivileged cases; (a) Where no innuendo required; (1) Where words set out in issue; *Brownlie v. Thomson*, *Anderson v. Hunter*; (2) Words set out in schedule; *Craig v. Jex Blake*; (b) Where an innuendo is required; (1) Where words set out in issue; (a) Innuendo introduced by "meaning thereby"; *Ingram v. Russell*, *Broomfield v. Greig*; (β) Innuendo put as a separate question; *Mitchell v. Grierson*, *Fraser v. Wilson*; (2) Words set out in schedule; *Mackay v. McCankie*, *Ogilvy v. Paul*—II. Simple issues in privileged cases: (a) Where no innuendo is needed; *Marianski v. Henderson*; (b) Where innuendo required; (1) Words set out in the issue; *Scott v. Johnston*; (2) Words set out in schedule; *Croucher v. Inglis*—III. Privileged cases of judicial slander; *Hallam v. Gye*, *Mackellar v. D. of Sutherland*, *Nelson v. Black*, *Williamson v. Umphray*, *Bayne v. Macgregor*—IV. Issue of holding up to public hatred, ridicule, and contempt; *Sheriff v. Wilson*, *Cunningham v. Phillips*—V. Issues for injury to a man in his trade, etc.; *Macrae v. Wicks*—VI. Issues for verbal injury; *Paterson v. Welch*—VII. Issues where there is a plurality of pursuers or

defenders; (a) Pursuers; (b) Defenders; *Jack v. Fleming*, *Adie v. Gowans*—VIII. Issues in cases other than those of judicial slander, where a person is sued for statements made by another; form of issues against newspapers; *Godfrey v. Thomsons*, *Sexton v. Ritchie*, *Wright v. Outram*, *Waugh v. Ayrshire Post, Limited*.

Actions for defamation sent to juries.

Issues.

Grounds for refusing issues. Defect in pursuer's record.

No issuable matter.

(1) If words not defamatory *per se*.

(2) If words appear to have been uttered in *rixa* or fair retort.

(3) If words not defamatory *per se* and the pursuer does not put a reasonable innuendo on them. General form of issue.

As actions for defamation are, when tried in the Court of Session, sent to a jury, it is the rule to focus in what is called the issue, the question which the pursuer wants put to the jury and answered by them. The pursuer proposes an issue, and if the Court allows an issue at all, it will approve, or alter the pursuer's issue, or substitute an entirely different one for it, as it considers proper. The usual way in which the Court refuses to allow a pursuer to proceed with his case is by refusing to allow him an issue. Apart from refusing an issue on account of defects in the pursuer's statements on record (*infra*, p. 262), the Court may refuse an issue because it holds there is no issuable matter. This finding by the Court may be based on one of three grounds.

(1) That the words complained of are not in themselves defamatory.

*Fraser v. Morris*, 15 R. 454, and *supra*, pp. 94-100.

(2) That the words complained of, though defamatory in themselves, appear from the record to have been uttered in *rixa* or in fair retort.

*Macdonald v. Rupperecht*, 21 R. 389, and *supra*, pp. 89-93.

(3) That the words complained of are not *per se* defamatory, and that the pursuer has failed to put a reasonable innuendo on them, which, if proved, would make them defamatory,

*Godfrey v. Thomsons*, 17 R. 1108.

The general form of an issue is simple. It runs: "Whether on or about the —— day of ——" (month and year), "in or near the" (place where defamatory statements were uttered), "the defender X, in the presence and hearing

" of Y and Z, falsely and calumniously said of A the pursuer  
 " that he was a " (quote statement complained of), "to his  
 " loss, injury and damage." "Damages laid at" (state the  
 amount).

But where the utterance complained of is long, it is usual  
 not to set it out in the issue, but to put it in a schedule, and  
 refer to the schedule in the issue, and then to ask if the  
 statement is of and concerning the pursuer, and is false and  
 calumnious.

*Dunbar v. Skinner*, 13 D. 1217.

Before examining any peculiarities of issues in particular  
 cases, it is first desirable to notice some requisite features of  
 all issues.

Requisites of  
 issues.

(1) In the first place an issue must charge the defender  
 with uttering the defamatory matter complained of in some  
 way. *p. L. Adam*.

(1) Must  
 charge de-  
 fender with  
 uttering defam-  
 atory matter  
 in some way.

*Jack v. Fleming*, 19 R. 1.

(2) An issue must contain the words which the pursuer  
 proposes to prove that the defender made use of. Thus the  
 Court refused an issue where it was asked whether the  
 defender had written a letter accusing the pursuer of having  
 committed crime unspecified.

(2) Must set  
 forth words  
 complained of.

*Stephen v. Paterson*, 3 M. 571.

And where the pursuer proposed an issue asking whether the  
 defender had "falsely and calumniously accused the pursuer  
 " of circulating statements of a defamatory and incriminating  
 " character, and of being the author or writer of lewd and  
 " immoral language regarding her," it was held that the issue  
 must be refused, as it left it open to prove any statement of  
 the kind mentioned, uttered by the defender about the  
 pursuer.

*Milne v. Smiths*, 20 R. 95.

And similarly when language is innuendoed into a defamatory  
 meaning importing a general charge of misbehaviour on the

part of the pursuer, and the general innuendo is followed by another specialising the manner in which the general misbehaviour took place, the issue must contain the specialisation. Thus when licensing justices complained of language as imputing breach of trust and corruption in office to them, by acting for the benefit of their own customers, it was held that the issues must ask whether the language represented the pursuer as a person who had been unfaithful to the public trust reposed in him as a Justice of the Peace, and had in his official position acted corruptly for the personal benefit of the customers of his bank.

*Mitchell v. Grierson*, 21 R. 367.

Meaning and effect in issue of "or other words to that effect."

The words of form often placed in the issue after the words complained of, "or other words to that effect," are only inserted to cover slight variances between the words as complained of and the words as proved to be uttered, and will not entitle a pursuer to prove entirely different language or the equivalent of the words complained of in another tongue when it has not been stated that the words were uttered in that other tongue.

*Martin v. M'Lean*, 6 D. 981.

Words uttered in foreign language.

If the defamatory matter has been uttered in a foreign tongue, it is sufficient in the issue to ask whether the defender said in that tongue (naming it) that the pursuer was (and then to give the English translation of the words used).

*Anderson v. Hunter*, 18 R. 467.

Separate issues not needed for each defamatory utterance complained of.

A pursuer is not bound to put in separate issues each defamatory term if all have been used at the same time.

*Brownlie v. Thomson*, 21 D. 480.

And even if they have been used on separate occasions they can go into one issue if kept clear and distinct.

*Paterson v. Welch*, 20 R. 744.

(3) Must be specific as to time, place, and persons.

(3) An issue must be specific as to the persons to whom the defamatory language was uttered, the place where, and



the time when. Thus it was held that in an action for slander uttered at a Parochial Board, the names of some of those present should be put in issue,

*Campbell v. Menzies*, 17 D. 1132,

and when the pursuer proposed in his issue to ask whether the defender uttered the language complained of on ten specified days of April, "or on one or more days of that month," "within Newhaven and its immediate neighbourhood," in presence of ten persons named, "or one or more of "the said persons," the issue was refused by the Court as not sufficiently specific.

*Bisset v. Ecclesfield*, 2 M. 1096.

Again when the pursuer proposed to ask whether "on various "occasions between the 4th and 7th May, at various places "in the city of Edinburgh, in presence of," persons named, "or one or more of them," the issue was refused as un-specific.

*Walker v. Cumming*, 6 M. 318.

And the same decision was given when the pursuer proposed to ask whether in a specified month in various unspecified places in or about the parish of B, in presence of X, Y, Z, etc., or of one or more of them, the slander was uttered.

*Anderson v. Hunter*, 18 R. 467.

A latitude of a month in the time when the defamatory matter complained of was uttered is allowed, however, if there is sufficient specification otherwise. Latitude allowed.

*White v. Clough*, 10 D. 332.

*Stephen v. Paterson*, 3 M. 571.

*Grant v. Fraser*, 8 M. 1011.

But if the pursuer avers that the matter of which he complains was continuously being uttered during a specified period, he will be allowed a greater latitude than one month, and thus an issue was allowed, Whether on various occasions

during the months of September, October, and November 1848, within a specified shop, the slander was uttered,

*Lockhart v. Cumming*, 14 D. 452,

and if a specific issue is taken, the pursuer will be allowed a general issue, whether on various occasions within a latitude of three months the statement was repeated to persons named.

*Innes v. Swanson*, 20 D. 250.

Apparent exception to requirement of specification.

There is an apparent exception to the rule that there must be specification in the issue of the persons to whom, and the place where, the matter complained of was uttered, in the case of libels published in newspapers and other prints in general circulation. It is customary in issues for libels so published merely to ask, Whether the defenders in the issue of a specified date published the matter complained of, and whether it is of and concerning the pursuer, and is false and calumnious.

*Sexton v. Ritchie*, 17 R. 680, 18 R. (H. of L.) 20.

*Godfrey v. Thomsons*, 17 R. 1108.

It is true that in these two cases, and in most others of a similar kind, the defender admits publication, but it is thought that, apart from the admission, there is no need to specify persons into whose hand the print has come, or the place where it was published. The case, however, will be different when the print is of the nature of a circular sent out by a person to a limited number of individuals. Then complete specification is required.

*Rodgers v. Macewen*, 10 D. 882.

But this case must be contrasted with that of

*Inglis v. Inglis*, 4 M. 491,

where an issue was allowed whether the defender had circulated among the pursuer's customers (without specifying them or the *locus* where the circulation took place) the circular complained of. The question, however, of specification does not seem to have been raised in this case.

(4) If the language complained of requires to be innuendoed, the innuendo put upon it by the pursuer must be set forth in the issue. It is quite competent to insert alternative innuendoes in an issue so long as they are kept clear of one another.

(4) Where innuendo required it must be set forth. Alternative innuendoes.

*M'Culloch v. Litt*, 13 D. 334.

But an issue will be vitiated which contains an alternative innuendo, one of the alternatives of which may not amount to what is defamatory.

*M'Laren v. Robertson*, 21 D. 183.

If all the innuendoes stated on record are to be founded on, they must appear in the issues,

*Scouller v. Gunn*, 14 D. 920.

The innuendo as set forth in the issue assumes two different forms. In the one the words complained of are set forth in the issue or in a schedule annexed to it, and are followed by the innuendo beginning, "meaning thereby that the pursuer."

Form of innuendoes in issues.

*Ingram v. Russell*, 20 R. 771.

In the other the words are set forth in the issue or are referred to as being contained in a schedule, and then the issue proceeds, "and whether the said words falsely and "calumniously represent the pursuer as," etc.

*Brimms v. Reid*, 12 R. 1016.

*Gray v. Walker*, 15 S. 1296.

Sometimes there is an innuendo within an innuendo. Thus where the defender had published an article in allegorical style in which the pursuer was represented as imagining he had aided in embezzlement, the issue put the article with the pursuer's glosses thereon, and then proceeded to ask if it falsely and calumniously represented the pursuer as having been guilty of embezzlement.

Innuendo within innuendo.

*Mackie v. Lawson*, 13 D. 725.

In those peculiar actions where the pursuer complains that the defender's language has held him up to public ridicule,

Innuendo in actions for holding up to contempt.

contempt and hatred, the main question put in the issue is whether the words were published in pursuance of an intention to expose and did calumniously and injuriously expose the pursuer to public hatred, contempt and ridicule.

*Cunningham v. Phillips*, 6 M. 926.

In short, the question whether the language can bear the innuendo put on it is the main one to be tried. It must be noticed too that in these cases the L. P. (Inglis) and L. Deas have laid it down that it is essential to ascribe in the issue the intention to the defender, of doing what the pursuer maintains is the effect of the language.

*Cunningham v. Phillips*, 6 M. 926.

This opinion has been discussed *supra*, p. 10. If it is to be regarded as binding for the future, the issue in

*M'Laren v. Ritchie*, Glegg on Reparation 497,

was defective, for it simply asked, "Whether the pursuer is "thereby calumniously and injuriously held up to public "hatred, contempt and ridicule?"

(5) If case privileged, malice, and if necessary, want of probable cause, must go in issue.

(5) If the case appears on the face of the record to be privileged, the pursuer must ask in his issue, not only whether the defender "falsely and calumniously" made the statement complained of, but also whether he made it "maliciously," and, in some cases, "without probable cause." It has been explained *supra*, p. 195, in what cases the pursuer requires to prove that the defender had not probable cause for his statement, as well as that he uttered it maliciously. Whenever the pursuer requires to prove want of probable cause, the question must be put in issue whether the defender made the statement without probable cause.

Substitutes in issues for "maliciously" and "without probable cause." In actions against ministers.

In some cases other words will be inserted in the issue, when the defender is privileged, in lieu of "maliciously" and "without probable cause." Thus, in actions against ministers, when they are privileged, the words "in violation of his duty as a minister" will be substituted.

*Dudgeon v. Forbes*, 11 S. 1014.

*Grant v. Coltart*, 12 S. 385.

*p. L. P. Boyle—Dunbar v. Stoddart*, 11 D. 587.

And the same words will also be substituted in an action against vestrymen for the expulsion by them of one of their number.

*Edwards v. Begbie*, 12 D. 1134.

In actions against medical men for granting certificates of insanity, the words "wrongfully, and without due enquiry" and examination," are substituted. In actions against medical men.

*Strang v. Strang*, 11 D. 378.

And in an action against a medical man for divulging a confidential report, the words "in breach of the duty undertaken by him in respect of such employment, and to which he was bound, the defender delivered a copy of the said report," etc., were substituted.

*A. B. v. C. D.*, 14 D. 177.

But the word "groundlessly" will not be allowed as a substitute for "without probable cause."

*Cameron v. Hamilton*, 18 D. 423.

The peculiarities of issues where there are two pursuers, or two defenders separately liable, or where a person is being sued in respect of a statement made by another on his behalf, are best exhibited by the examples which will be found *infra*.

Specimens of issues actually allowed by the Court :—

I. Simple issues in unprivileged cases.

(a) Where no innuendo is required.

(1) Words set out in issue.

"Whether on or about the 16th day of July 1857, and at or near the gate of the east lodge of Murdiston House, in the parish of Shotts and county of Lanark, the defender did falsely and calumniously say of and concerning the

Issues where two pursuers or defenders.

Issues where person sued for defamation uttered by another on his behalf.

Examples of issues.

I. Simple issues in unprivileged cases.

(a) Where no innuendo required.

(1) Where words are set out in issue.

"pursuer, to J. F., forester on the estate of Murdiston afore-said, that he was a blackguard and person of bad character, and the said R. S. would be no gentleman if he retained the pursuer in his employment after becoming acquainted with his bad character, and further, that the pursuer was a murderer, or that he had been an accomplice in an act of murder, to the loss, injury, and damage of the pursuer."

*Brownlie v. Thomson*, 21 D. 480.

"Whether in or about the beginning of January 1890, at or near the Barvas Inn, the defender, in presence and hearing of J. G. M., merchant, Stornoway, did falsely and calumniously say of and concerning the pursuer, 'that it would be of no use to take the pursuer as county councillor, for he would be bankrupt soon,' or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage."

*Anderson v. Hunter*, 18 R. 467.

(2) Words set out in schedule.

(2) Words set out in schedule—

"Whether the defender, in a speech which she made or read at a meeting of the contributors to the Royal Infirmary, held in Edinburgh on the 2nd day of January 1871, did, in presence and hearing of Dr. R. C., Professor of *Materia Medica* in the University of Edinburgh, D.S. etc., use and utter the words and sentences set forth in the schedule hereto annexed, or part thereof, or words and sentences to that effect, and whether the said words and sentences are in whole or in part of and concerning the pursuer, and are false and calumnious, to the loss, injury, and damage of the pursuer."

*Craig v. Jex Blake*, 9 M. 973.

(b) Where an innuendo is required.

(1) Words set out in issue.

(a) Innuendo introduced by "meaning thereby."

(b) Where an innuendo is required.

(1) Words set out in issue.

(a) Innuendo introduced by the words "meaning thereby."

" Whether on or about the 19th day of December 1892, and at or near the office in Paisley of the Clydesdale Bank, Limited, in presence and hearing of the following clerks of the bank, viz." (name and design), "or one or more of them, the defender falsely and calumniously stated of and concerning the pursuer that he (the defender) had got his opinion confirmed that the said bills were not genuine, meaning thereby that the pursuer had forged, or procured to be forged, the signatures of the said Donald Sutherland, appearing on said bills, and had uttered these as genuine, or did use words of the like import and effect of and concerning the pursuer, to his loss, injury, and damage." (2nd issue.)

*Ingram v. Russell*, 20 R. 771.

" Whether on or about 3rd October 1867, and in or near the Council Chambers, etc., the defender did, in the presence and hearing of Charles Moir and others, falsely and calumniously say that the defender would probably have the pursuer's premises examined, as, according to the law, peace officers might by warrant search baker's premises, and if any adulterated bread or flour was found, the same might be seized and disposed of, meaning thereby that the pursuer kept, in violation of the law, adulterated bread or flour in his premises, or did falsely and calumniously use or utter words to that effect, to the loss, injury, and damage of the pursuer."

*Broomfield v. Greig*, 6 M. 563.

(β) Innuendo put as a separate question.

" Whether on or about 21st June 1893, in the Town Hall, Lerwick, and in the presence and hearing of A, B, C, or one or more of them, the defender uttered the following words, or words of like import and effect: ' The Licensing Court had always been very amusing to him. He had appeared before that Court, both for and against licenses,

(β) Innuendo put as a separate question.

“ ‘and they used to size up the bench and say, ‘Oh yes, this  
“ ‘will be a day for licenses, or it will be a day when none  
“ ‘will be granted’; or they would say, ‘Oh, you are right  
“ ‘enough. You are a customer at Mr. So and So’s bank, and  
“ ‘he’s on the bench,’ or ‘So and So has two clients on the  
“ ‘bench, his license is quite sure’; and whether the said  
“ statement is in whole or in part of and concerning the  
“ pursuer, and falsely and calumniously represents the  
“ pursuer as a person who had been unfaithful to the public  
“ trust reposed in him as a Justice of the Peace, and had  
“ in his official position acted corruptly for the personal  
“ benefit of the customers of his bank, to the pursuer’s loss,  
“ injury, and damage.”

*Mitchell v. Grierson*, 21 R. 367.

“ Whether at a public meeting of the Board of Health of  
“ the burgh of Hawick, held there on or about the 12th day  
“ of October 1849, the defender was present, and in an  
“ address to the meeting made use of the following words,  
“ or words to the following effect, viz.—‘That he was aston-  
“ ‘ished at the attempt which had been made to foist a man  
“ ‘into the magistracy (meaning by a man the pursuer), one of  
“ ‘the men who had gone into the infant school, formerly a  
“ ‘place of worship, afterwards an infant school, and now used  
“ ‘as an hospital under the dreadful infliction of cholera, and  
“ ‘who had made and used the same as a brothel’; and  
“ whether these words or words of similar import are in whole  
“ or in part of and concerning the pursuer, and were intended  
“ to represent, and do falsely and calumniously represent, the  
“ pursuer as a man who had, under aggravating circumstances,  
“ resorted to the said house, formerly a place of worship, there-  
“ after an infant school, and now used as a house of refuge or  
“ receptacle for the healthy members of families suffering  
“ under the disease of cholera and others, and there used  
“ the same as a brothel, whereby he had rendered himself



“unworthy of public trust, or of bearing office as a magistrate  
“in the said burgh, to the injury and damage of the pursuer.”

*Fraser v. Wilson*, 13 D. 289.

(2) Words set out in a schedule.

(2) Words set  
out in schedule.

“Whether the defender wrote and sent to the pursuer a  
“letter in the terms contained in the schedule hereto annexed,  
“and whether said letter is of and concerning the pursuer, and  
“falsely and calumniously represents that he has been guilty  
“of forgery or uttering, to the loss, injury, and damage of  
“the pursuer.”

*Mackay v. McCankie*, 10 R. 537.

“Whether the defender A. P. wrote or caused to be written,  
“and delivered or caused to be delivered to the defender  
“Y. Z., the letter printed in the schedule hereto appended, and  
“whether the said letter was in whole or in part of and con-  
“cerning the pursuer, and falsely and calumniously represents  
“that the pursuer had been guilty of the crime of assaulting  
“W. D., post-boy in Brechin, in a dastardly and cowardly  
“manner, and that the pursuer was a person unfit to hold the  
“office of a Justice of the Peace, to the loss, injury, and  
“damage of the pursuer.”

*Ogilvy v. Paul*, 11 M. 776.

II. Simple issues in privileged cases.

(a) Where no innuendo is required.

II. Simple  
issues in privi-  
leged cases.

(a) Where no  
innuendo is  
required.

“Whether at Hamilton, on or about the 21st day of  
“October 1840, in presence and hearing of J. V., one of the  
“sheriff-substitutes of the county of Lanark, and of A. C.,  
“writer in Hamilton, or either of them, the defender did  
“falsely, maliciously, and calumniously say that the pursuer  
“had been laying schemes for the purpose of getting quit of  
“R. S. & Son as tacksmen of a quarry, and that he had  
“never seen grosser acts of fraud than had been committed  
“by the pursuer—that he ought to be tried in a criminal  
“Court for those offences, and ought to be transported—or

“ did use or utter words to that effect, to the loss, injury, and  
“ damage of the pursuer.”

*Marianski v. Henderson*, 3 D. 1036.

(b) Where in-  
nuendo  
required.  
(1) Words set  
out in the  
issue.

(b) Where innuendo required.

(1) Words set out in the issue.

“ Whether on or about the 24th day of December 1883,  
“ and within the Sheriff Court buildings, Edinburgh, the  
“ defender did, in the presence and hearing of D. W., Bellevue  
“ Terrace, Edinburgh, and others, say to and of and con-  
“ cerning the pursuer :—‘ Are you aware of the consequences  
“ ‘ under the statute of lodging a state of affairs such as you  
“ ‘ have done?’—referring to a state of affairs dated 18th  
“ December 1883, lodged by the pursuer in the hands of the  
“ Clerk of Court, in compliance with an order of Sheriff-  
“ Substitute Hamilton, dated 30th November 1883, in a peti-  
“ tion for *cessio* against the pursuer at the instance of Patrick  
“ Turnbull, liquidator of the Money Order Bank, Limited;  
“ and whether the said words so used falsely, maliciously,  
“ and injuriously represented, and were intended to represent,  
“ that the pursuer, in lodging said state of affairs, had been  
“ guilty of a crime and offence under the provisions of the  
“ Debtors (Scotland) Act 1880, and the Acts therein referred  
“ to, or one or other of them ; or did falsely, maliciously, and  
“ calumniously use and utter words to that effect, to the loss,  
“ injury, and damage of the pursuer.”

*Scott v. Johnston*, 12 R. 1022.

(2) Words set  
out in schedule.

(2) Words set out in schedule.

“ Whether the defender on 16th October 1888 wrote and  
“ sent to Mr. T. B., Inspector of Poor, Dundee, a letter in the  
“ terms contained in Schedule No. 1, hereto annexed ; and  
“ whether said letter is of and concerning the pursuer, and  
“ falsely, and calumniously, and maliciously, and without  
“ probable cause, represents him to be a man of such brutal  
“ character as to be unfit to have charge of children boarded

“ out by the parochial authorities of Dundee, under his  
 “ guardianship, and that it was the duty of the Parochial  
 “ Board forthwith to remove them, to his loss, injury, and  
 “ damage.”

*Croucher v. Inglis*, 16 R. 774.

III. Privileged cases where statements complained of were made in judicial proceedings.

III. Issues in privileged cases where statements complained of were uttered in judicial proceedings.

“ It being admitted that on the 3rd day of February 1830  
 “ the defenders G and H raised, and thereafter insisted in an  
 “ action against the pursuer for payment of the sum of £500,  
 “ or of such other sum as should appear to be due by him as  
 “ a balance due by the pursuer to the defenders.”

“ Whether, in a paper or pleading entitled revised con-  
 “ descence in the said action, the said G and H did insert,  
 “ or cause to be inserted, the following words, or words to the  
 “ following effect, according to the meaning hereinafter set  
 “ forth, *videlicet*: ‘The defender’ (meaning the present pur-  
 “ suer) ‘was responsible for this deficiency,’ etc. etc. And  
 “ whether the whole or any part of the said words are of and  
 “ concerning the pursuer, and are false and calumnious, and  
 “ were maliciously inserted or caused to be inserted in the  
 “ said paper or pleading, to the loss, injury, and damage of  
 “ the pursuer.”

*Hallam v. Gye*, 14 S. 199.

“ It being admitted that the pursuer presented a note of  
 “ suspension before the Court of Session on or about the 15th  
 “ day of June 1857, of a decree of removing proceeding on a  
 “ summons of removing against him at the instance of the  
 “ said Duke of Sutherland and George Gunn, and to which  
 “ note answers herein held as repeated were lodged for the  
 “ defenders on or about the 25th day of July 1857. Whether  
 “ in the said answers to the said note of suspension the  
 “ defenders inserted the following statements, viz.—‘During  
 “ ‘the last few years,’ etc. And whether the said statements,

“ or any part thereof, are of and concerning the pursuer, and  
“ are false and calumnious, and were maliciously inserted  
“ in the said answers, to the loss, injury, and damage of the  
“ pursuer.”

*Mackellar v. Duke of Sutherland*, 21 D. 222.

“ It being admitted that the defenders” (procurators-  
fiscal) “ prepared, and on or about 26th December 1864  
“ presented to the sheriff-substitute of the county of Fife a  
“ petition containing the words and sentences set forth in the  
“ schedule annexed hereto: Whether the said words and  
“ sentences are of and concerning the pursuer, and are false  
“ and calumnious, and were inserted in said petition by the  
“ defenders maliciously and without probable cause, to the  
“ loss, injury, and damage of the pursuer.”

*Nelson v. Black*, 4 M. 328.

“ Whether the defender wrote or caused to be written, and  
“ delivered to A. J. R., the letter set out in the schedule  
“ hereto appended, and maliciously instructed the said  
“ A. J. R. to read the said letter in a Licensing Court about  
“ to be held at Lerwick on the 29th October 1889, and  
“ whether the said A. J. R., acting on the instructions so  
“ maliciously given, did in the Court-house at Lerwick, in  
“ presence or hearing of X, Y, Z, or one or more of them, on  
“ the said 29th October 1889, read the said letter, and whether  
“ the said letter is of and concerning the pursuer, and falsely,  
“ calumniously, and maliciously represents that the pursuer  
“ was so addicted to drink as to make him an unfit person to  
“ hold a grocer's license, to the loss, injury, and damage of the  
“ pursuer.”

*Williamson v. Umphray*, 17 R. 905.

“ It being admitted that J. M., wife of P. M., clothier,  
“ Comrie, and the said P. M., presented a petition to the  
“ Court of Session for the appointment of a *curator bonis* to  
“ W. M., residing in Comrie: It being further admitted that

“ J. B., Esq., advocate, acted as counsel, and the defender as agent for the said petitioners, and that the petition depended before Lord Jerviswood as Ordinary : Whether on or about 10th January 1861, and within the Parliament House, the said J. B. as counsel for the petitioners, in conformity with the instructions of the defenders maliciously given, did in the presence of a great number of persons then in the Court-room, and among others in presence and hearing of Charles Scott, Francis William Clark, and William Frederic Mair, Esquires, advocates, or one or more of them, make to the Lord Ordinary a false and calumnious statement that the pursuer had procured the indorsation of W. M., a lunatic, to a deposit receipt, etc., to the loss, injury, and damage of the pursuer.”

*Bayne v. Macgregor*, 24 D. 1126.

IV. Issue of holding up to public hatred, contempt, and ridicule.

“ It being admitted that the pursuer is teacher in Philp’s Institution in Kirkcaldy, and that the defender is the printer, proprietor, and publisher of the weekly newspaper printed and published in Kirkcaldy, called the *Fifeshire Advertiser* : Whether, in the number of the said newspaper dated and published on 14th May 1853, there was printed, published, and circulated by the defender, the article or paragraph contained in Schedule C appended to the issues, and entitled ‘ Striking and Awful Occurrence,’ and whether the said article or paragraph, or part thereof, was of and concerning the pursuer, and was written in pursuance of an intention to expose the pursuer to ridicule and contempt, to wound his feelings as a private individual, and to degrade him in the estimation of the society in which he resides, to the loss, injury, and damage of the pursuer.”

IV. Issue of holding up to public hatred, contempt, and ridicule.

*Sheriff v. Wilson*, 17 D. 528.

“ It being admitted, etc., whether the said articles, pass-

“ages, and verses, are of and concerning the pursuer, and  
 “were published in pursuance of an intention to expose, and  
 “did calumniously and injuriously expose the pursuer to  
 “public hatred, contempt, and ridicule, to his loss, injury,  
 “and damage.”

*Cunningham v. Phillips*, 6 M. 926.

V. Issues for  
 injury to a  
 man in his  
 trade, etc.

V. Issues for injury to a man in his trade, business, profession, or occupation.

These issues are generally in the common form, asking whether the statement is of and concerning the pursuer, and falsely and calumniously represents, etc. But when the accusation is that the pursuer sells, or has dealt in an inferior article, the issue may take the following form:—

“Whether, in the *Glasgow Evening News* and *Star* of 10th August 1885, the defender falsely and calumniously printed and published a paragraph of and concerning the Albany Hotel, Glasgow, of which the pursuer was then lessee, in the terms set forth in the schedule hereto annexed, to the loss, injury, and damage of the pursuer.”

*Macrae v. Wicks*, 13 R. 732.

VI. Issues for  
 verbal injury.

VI. Issues for verbal injury. These issues have by a recent judgment of the Court been assimilated to those for holding up to public hatred, contempt, and ridicule. But it is thought that they ought rather to be after the type of that allowed in *Macrae v. Wicks*, *supra*, and reasons for this opinion are given *supra*. The form, however, as sanctioned by the First Division is—

“Whether on the occasions after-mentioned, or on one or other of them, viz. (1) on or about the 11th day of June 1892, at a meeting of the School Board of St. Andrews, held in the Town Hall of St. Andrews, in the presence and hearing of X, Y, Z, and others; and (2) on or about the 26th day of October 1892, in the Town Hall of St. Andrews, and in the presence and hearing of U, V, W, and others, the

“defender stated that the pursuer at a recent meeting of the  
 “Governors of Madras College, St. Andrews, had said that  
 “the pupils from the board school, or the working men’s  
 “children from the burgh school of St. Andrews, if admitted  
 “to Madras College would contaminate the genteel children  
 “who were there, or made statements of similar import and  
 “effect, whether the said statements are false, and were made  
 “with the design of exposing, and did expose the pursuer  
 “to public hatred and contempt, to his loss, injury, and  
 “damage.”

*Paterson v. Welch*, 20 R. 744.

VII. Cases where there is a plurality of pursuers or defenders.

VII. Issues  
 where there is  
 a plurality of  
 pursuers or  
 defenders.

(a) Pursuers. Where two or more pursuers sue, in one action, a defender for defamatory utterances which they say affect both of them, they each take a separate issue, and there is no peculiarity in it.

(a) Pursuers.

*Mitchell v. Grierson*, 21 R. 367.

*Harkes v. Mowat*, 24 D. 701.

(b) Defenders. Where two or more defenders, not being a partnership or company or incorporation, are sued as being concerned in the utterance of a defamatory statement, the following is the style of issue:—

(b) Defenders.

“Whether on or about the 8th day of January 1891, and  
 “at or near the house in Milliken Street, Houston, occupied  
 “by Alexander Scott, gardener, there, the defenders, J. C. H.  
 “and W. E., or either, and which of them in presence and  
 “hearing of the said A. S., and of Mrs. E. B. or S., his wife,  
 “or one of them, falsely and calumniously stated of and con-  
 “cerning the pursuer that the pursuer’s conduct towards Z  
 “had been shameful, meaning thereby that the pursuer had  
 “committed or connived at immoral conduct towards Z, or  
 “did use words of like import of and concerning the pursuer,  
 “to his loss, injury, and damage. Damages against the

- “defender, J. G. H., laid at £500. Damages against the  
“defender, W. F., laid at £100.”

*Jack v. Fleming*, 19 R. 1.

“Whether on or about the 12th day of February 1845  
“the defenders did, acting in concert, maliciously and without  
“probable cause, write and transmit, or cause to be written  
“and transmitted, to the procurator-fiscal of the county of  
“Perth a declaration or information falsely accusing the  
“pursuer of a criminal offence against the laws for the pre-  
“servation of game, in consequence of which the pursuer was  
“apprehended, and sent as a prisoner from Muthil to Perth  
“and incarcerated in the prison of Perth for six days or  
“thereby, to the loss, injury, and damage of the pursuer,”

or

and then separate issues in similar terms against each  
defender.

*Adie v. Gowans*, 9 D. 495.

VIII. Issues in  
cases other  
than those of  
judicial slander  
where person  
is sued for de-  
famatory state-  
ments made by  
another.

VIII. Cases, other than those of judicial slander, where  
a person is sued for defamatory statements made on his  
instructions by another, or by another for whom he is  
responsible.

In these cases it is now customary in the issue to ignore  
that the utterance was not actually personally made by the  
defender, and to treat the case practically as though the  
defender were the utterer. Thus in actions against news-  
papers the proprietors are sued for defamation, though they  
may never have had the slightest knowledge of the de-  
famatory matter in respect of which they are sued. The  
ordinary form of issue against a newspaper is as follows:—

Form of issue  
against a news-  
paper.

“It being admitted that on or about 19th April 1890 the  
“defenders printed and published in the *Dundee Weekly News*  
“of that date the article contained in the schedule hereunto  
“annexed: Whether the following words in said article, viz.—  
“‘Now one of them has left the town. Any information,’



“ etc. (quote) are of, and concerning the pursuer, and falsely  
 “ and calumniously represent that the pursuer, being liable  
 “ as tenant or otherwise to pay the rent of the hall used for  
 “ said meeting on the Sunday evening referred to, secretly  
 “ left Dundee without leaving any address, and without  
 “ making provision for payment of said rent, for the purpose  
 “ of defrauding the proprietor of the hall of his just claims  
 “ for same, or make similar false and calumnious repre-  
 “ sentations of and concerning the pursuer, to his loss, injury,  
 “ and damage.”

*Godfrey v. Thomsons*, 17 R. 1108.

“ It being admitted that the defenders printed and  
 “ published in the *Scotsman* newspaper of 19th July 1889  
 “ the matter contained in the schedule hereunto annexed:  
 “ Whether the said publication or part thereof is of and  
 “ concerning the pursuer, and falsely and calumniously re-  
 “ presents that he on the occasions referred to in the letter  
 “ of 15th July 1889, quoted in said schedule, drank alcoholic  
 “ liquors to such excess as to produce intoxication and, on  
 “ the occasion first mentioned in said letter, *delirium tremens*,  
 “ or makes similar false and calumnious representations  
 “ of and concerning the pursuer, to his loss, injury, and  
 “ damage.”

*Sexton v. Ritchie*, 17 R. 680.

“ Whether on or about the 23rd January 1889 the de-  
 “ fenders published in the *Glasgow Herald* an article or  
 “ paragraph in the terms of the schedule hereunto annexed:  
 “ Whether the statements therein set forth are of and con-  
 “ cerning the pursuer, and falsely and calumniously represent  
 “ that the pursuers were in financial difficulties, and were  
 “ being financed by means of accommodation bills and  
 “ advances of money by a person named Smyth, to the loss,  
 “ injury, and damage of the pursuers.”

*Wright v. Outram*, 16 R. 1004.

" It being admitted that the defenders in the issue of  
" 28th July 1893 of the *Ayrshire Post* newspaper printed and  
" published the paragraph, including the pretended letter,  
" contained in the schedule hereto annexed: Whether the  
" statements contained in said paragraph and letter are of  
" and concerning the pursuer, and falsely and calumniously  
" represent that the pursuer had written a letter for publi-  
" cation in a newspaper, in which letter he incited to riot  
" and bloodshed, to the loss, injury, and damage of the  
" pursuer."

*Wagh v. Ayrshire Post, Limited*, 21 R. 326.

## CHAPTER XIX

### COUNTER ISSUES

If *veritas* pleaded, counter issue must be taken—Counter issues only allowed when *veritas* is pleaded—Formerly otherwise—No counter issue of privilege—Nor of *compensatio injuriarum*—Nor of waiver by apology—Nor of probable cause—Nor in palliation—Nor of the law of a foreign country—Counter issues allowable on separable part of utterance—Counter issues where specific accusation has been made—Counter issues where general accusation has been made—Requisites of counter issues: (1) They must completely justify the whole or a separable part of the libel, and must tally with defender's statements on record; (2) They must be specific as to time, place, and persons; examples; latitude allowable; (3) Facts put in counter issue must be those in contemplation when libel uttered; (4) Where statement is innuendoes counter issue must put innuendo; but defender need not echo consequential part of pursuer's innuendo—Counter issue where specific charge is made; example—Counter issues where general charges are made; examples—Counter issues in actions for holding up to public hatred, etc.

If the defender in an action for defamation pleads *veritas* *convicii* he must take a counter issue in order to entitle him to prove the *veritas* to the jury. The counter issue simply asks whether what the pursuer complains of the defender having said is true. At one time it was held that counter issues might be taken in support of other pleas than that of *veritas*. But now they are never allowed except to maintain this plea. Why there should be counter issues at all has never been clearly explained, and, seeing they exist, one is at a loss to know why they should be only taken when the plea of *veritas* is maintained. The reason possibly is that whether

If *veritas* pleaded, counter issue must be taken.

Counter issues only allowed when *veritas* is pleaded.

the statement complained of is true, is a question purely of fact, and that therefore it can be properly put to the jury in a precise question for their judgment; while other pleas depend more or less on legal considerations which are not within the jury's province. In

Formerly  
otherwise.

*Macfarlane on Issues*, p. 30,

the author states that in actions for defamation there are four situations in which a defender may find it advisable to take a counter issue: (1) where he pleads *veritas*; (2) where he pleads *compensatio injuriarum*; (3) where he pleads privilege; and (4) where his defence is founded on a waiver or discharge of the grounds of action. There is, however, express decision against this proposition so far as it relates to the (2), (3), and (4) heads. Attempts to obtain counter issues have been made in the circumstances mentioned in Mr. Macfarlane's book, under (2), (3), and (4), as those in which a defender would deem it advisable to take them, and in other circumstances not dealt with by him, but they have all failed.

No counter  
issue of privi-  
lege.

(1) There is no necessity for a counter issue of privilege, and such a counter issue will not be allowed.

*Torrance v. Leaf*, 13 S. 72.

*Scott v. Johnston*, 12 R. 1022.

And thus a proposed counter issue, Whether a newspaper report complained of as defamatory was fair and accurate, and thus entitled to the privilege of fair and accurate report, was refused.

*Wright v. Outram*, 16 R. 1004.

In one case only has a counter issue of what was practically privilege been allowed. Where a dissenting church minister sued his superior (a bishop) for having excommunicated him on specified grounds, which he maintained were defamatory, the defender was allowed a counter issue, asking whether the pursuer had subscribed a declaration

promising obedience to the canons of the church, and whether after being instituted by the defender, who was bishop of the diocese, as minister of a particular church, he continued at the date of the pronouncing and publishing the sentence libelled, subject to such sentence by the defender as bishop foresaid, and whether the said sentence was pronounced and published by the defender in the due and regular exercise of his said functions.

*Skinner v. Dunbar*, 13 D. 1217.

This case must be looked on with suspicion, as it is entirely unsupported by others.

(2) No counter issue of *compensatio injuriarum* will be allowed, Nor of *compensatio injuriarum*.

*Tullis v. Crichton*, 12 D. 867.

*Bertram v. Pace*, 12 R. 798.

As explained (p. 253), if the defender has to complain of any defamatory statements made by the pursuer about him, his proper course of procedure is by raising an action for damages in respect of them. If he recovers damages he then sets them off against any damages which may be obtained in the action against him.

(3) No counter issue of waiver by apology accepted will be allowed. Nor of waiver by apology.

*Campbell v. Menzies*, 17 D. 1132.

(4) No counter issue of probable cause will be allowed the defender. Nor of probable cause.

*Keay v. Wilson*, 5 D. 407.

*Holehouse v. Walker*, 15 D. 665.

(5) "A counter issue in palliation" (as distinguished from justification) "is incompetent." Nor in palliation.

*p. L. Jeffrey—Lowe v. Taylor*, 7 D. 117.

But without a counter issue the defender may prove all the circumstances in which the defamatory statement complained of was uttered, in mitigation of damages.

p. L. C. C. Adam—*Scott v. McGavin*, 2 Mur. 484.

p. L. P. Boyle—*White v. Clough*, 10 D. 332.

*McCulloch v. Litt*, 13 D. 960.

Nor of the law  
of a foreign  
country.

(6) No counter issue will be allowed asking whether by the law of another country, in which the defamatory statement is alleged to have been made, no action for such a statement would be allowed.

*MLarty v. Steel*, 8 R. 435.

Counter issue  
allowable on  
separable part  
of utterance.

But where the defender seeks to justify the statement complained of or any separable part of it by pleading *veritas* he must take a counter issue.

*Fenton v. Currie*, 5 D. 705.

And he will not be allowed to lead evidence of the truth of the statement he has made unless he takes a counter issue,

*Scott v. Docherty*, 6 D. 5.

Though it was questioned whether a counter issue of *veritas* could be taken on a material and separable part of an alleged defamatory statement without the defender seeking to justify the whole,

*Carmichael v. Cowan*, 1 M. 204,

the view that a defender could take a counter issue on a material and separable part of the statement had been expressed before that case by L. Moncreiff in

*M'Neill v. Rorison*, 10 D. 15,

and it is now regularly the practice to allow a defender to plead *veritas* and to take a counter issue on any part of the alleged defamatory statement, which, standing alone, would entitle a pursuer to complain of it as defamatory.

Counter issue  
where specific  
accusation has  
been made.

There are two distinct classes of utterances to which *veritas* may be pleaded. *First*, where the defamation consists in charging the pursuer with having done a specified act. In such a case the proper counter issue is to ask

Where general  
accusation has  
been made.

whether the pursuer did the act with which he is charged. *Second*, where the defamation consists in a general accusation, of

which it is impossible *in terminis* to prove the *veritas*. In such a case the defender is allowed to condescend on particular instances, which, if proved, would justify the general accusation, and to take a counter issue asking whether it is true that the pursuer did the acts specified. L. Deas.

*McDonald v. Begg*, 24 D. 685.

But it has now been decided that when a general accusation has been made, it is sufficient for the defender when pleading *veritas* to specify on record alone the instances in support of the general statement, and to take a general counter issue, the proof of which will be limited to the instances set forth on record.

*Hunter v. MacNaughton*, 31 S.L.R. 713.

In both cases certain rules relative to counter issues apply and must be observed. Requisites of counter issues.

(1) A counter issue "must go to a complete justification (1) They must completely justify the whole or a part of the libel." (*p. L. P. Boyle*),

*Lowe v. Taylor*, 7 D. 117,

*Paul v. Jackson*, 11 R. 460,

*Bertram v. Pace*, 12 R. 798,

and if it does not it will be refused by the Court as not justifying it. See cases just cited and

*Burnaby v. Robertson*, 10 D. 855.

*Harkes v. Mowat*, 24 D. 701.

*Fletcher v. Wilsons*, 12 R. 683.

*Milne v. Walker*, 21 R. 155.

And it must be observed that the counter issue must tally with the defender's statement on record which he puts forward in justification of what he has said. Thus when the defender stated on record that the pursuer had had "improper intercourse" with a woman, he was not allowed to take a counter issue whether the pursuer had had "carnal intercourse" with her. And must tally with defender's statements on record.

*Rankin v. Simpson*, 21 D. 1057.

And thus where an Inspector of the Poor complained of a

charge that he had starved and robbed the poor of their rights, a counter issue asking whether he had done so in the Poor-house was refused, because *prima facie* it was not within the pursuer's functions to deal with the poor in the Poor-house, and his connection with the cases there was not distinctly averred.

*Beattie v. Mather*, 22 D. 952.

(2) They must be specific as to time, place, and persons.

Examples.

(2) The defender must be as specific in stating the time and place when and where the pursuer did the act which the defender pleads as a justification of what he said, as the pursuer requires to be in specifying the occasion of the alleged defamatory utterance. Thus when the pursuer, a medical man, complained that the defender had said that on one of the pursuer's professional visits he was drunk, the defender took a counter issue, whether the pursuer on the occasion of a visit made as a medical attendant at a specified place and time, was the worse of drink.

*Balfour v. Wallace*, 15 D. 913.

And when the charge against the pursuer was of keeping a brothel, the counter issue asked, "Whether in or previous to the month of August 1850, the pursuer's premises in Queensferry Street, while in her occupancy, were used as a resort of prostitutes and their associates."

*Mason v. Tait*, 13 D. 1347.

Latitude allowable.

But some degree of latitude will be allowed in the counter issues when latitude has been allowed in the issues. *p. L. P. Boyle*.

*Lowe v. Taylor*, 7 D. 117.

And thus where the accusation complained of is one of having over a period of time done a particular thing, the defender will be allowed a counter issue in general terms, asking whether during a particular period the pursuer did it.

*Aird v. Kennedy*, 13 D. 775.

*Hunter v. MacNaughton*, 31 S.L.R. 713.



(3) A counter issue will be refused in justification of a general accusation when the facts put in the counter issue are evidently not those on which the defender relied in making the accusation. Thus when the pursuer complained that the defender had stated of him, "If he was as well known in Edinburgh as I know him or the people of Dunfermline, he would have been kicked out of the town long ago, he is one of the worst characters I ever knew"; a counter issue asking whether the pursuer had been convicted shortly before the libel was written of a breach of his public-house certificate by allowing women of ill fame to assemble on his premises, was refused on the ground that the libel evidently referred to matters antecedent to the date of the conviction.

(3) Facts put in counter issue must be those in contemplation when statement was uttered.

*M'Donald v. Begg*, 24 D. 685.

Again it was held incompetent to take a counter issue asking whether the pursuer was a poacher in 1851, to justify calling him a blackguard in 1857, and it was held that the facts put in the counter issue must reach down to the time when the expressions were used.

*Brownlie v. Thomson*, 21 D. 480.

The propriety of this rule may be doubted. There seems neither common sense nor logic in preventing a defender from substantiating a general accusation against a pursuer simply because the precise facts on which the accusation can be substantiated were not in the defender's view when he made it. If a man is a blackguard, why should a defender, who has said so, be prevented from proving it because the facts which substantiate the charge were not in his knowledge when he made it? It must be noticed that L. Deas dissented in *M'Donald's* case, and it is to be hoped that the Court will reconsider that judgment, and the one in *Brownlie*, whenever occasion arises. In the more recent case of

*Fletcher v. Wilsons*, 12 R. 683,

the question was in a manner discussed, and some of the

judges seemed to lean to the view supported by these two cases, but the decision in *Fletcher's* case is justifiable on other grounds, and cannot therefore be considered as an affirmation of the rule now under discussion.

(4) Where statement is innuendoed, counter issue must put the innuendo.

(4) In cases where the statement complained of is innuendoed into a defamatory meaning, the defender in his counter issue must ask whether the statement as innuendoed is true. *p. L. J. C. Inglis.*

*Harkes v. Mowat*, 24 D. 701.

This rule is much complained of, and *L. Deas* was of opinion that in certain cases it did not apply.

*Torrance v. Weddel*, 7 M. 243.

In his view where the defender has made a statement of a definite fact about the pursuer, and the pursuer complains of the statement as involving by innuendo a charge against him, the defender can take a counter issue merely asking whether the statement he has made about the pursuer is true, as made by him. But where the defender has made a statement in ambiguous language which may have a defamatory meaning, he must in pleading *veritas* take a counter issue asking whether the pursuer has done the thing which he complains that the defender's statement as innuendoed implies. Thus when a defender stated that the pursuer offered the defender £50 not to compete with him for a contract, and the pursuer innuendoed this statement as being a charge of bribery against him, *L. Deas* was of opinion that the defender might simply take a counter issue asking whether the defender had offered him £50 not to compete. But if "in an action at the instance of C the issue were whether A falsely and calumniously said to B that C had had conversation, meaning thereby criminal conversation, with B's wife, the counter issue in justification there would be whether he had actually had criminal conversation with the wife of B." The cogency of *L. Deas'* view is obvious, and it is to be regretted that,

so long as counter issues are required at all, it is not adopted. It is, however, definitely settled that a counter issue must contain a justification of the defender's language in the sense put on it by the pursuer's innuendo. The reason for this seems to be that unless the pursuer proves his innuendo he fails, and if he does prove it, nothing short of proof of the truth of the defender's statement as innuendoeed can be a proof of *veritas* of the defamatory statement complained of. If the defender maintains that the innuendo is not just, he can prove the facts and circumstances in which the statement was made without a counter issue, and among other facts that the statement in its literal and *prima facie* meaning, and in the meaning put upon it by the defender, was accurate.

This rule, however, is subject to one modification. If a pursuer in his issue innuendoes words, and proceeds to ask whether a certain consequence should ensue if the words as innuendoeed were true, the defender need not in his counter issue do more than meet the innuendo pure and simple, and does not require to justify the consequence. Thus, when the issue was whether the letter was of and concerning the pursuer, and falsely and calumniously represented that he had been guilty of the crime of assaulting W. D. in a dastardly and cowardly manner, and that the pursuer was a person unfit to hold the office of a Justice of the Peace, a counter issue was allowed, whether at a date specified the pursuer, being then a Justice of the Peace, assaulted W. D. on the street in a dastardly and cowardly manner, and it was held unnecessary to ask the consequence whether the pursuer was unfit to hold the office of Justice of the Peace.

But defender need not echo consequential part of pursuer's innuendo.

*Ogilvy v. Paul*, 11 M. 776.

Again, when the issue asked whether the statement complained of represented that the pursuer "kept his hotel in a "state of squalid untidiness and dirt, and permitted persons

"to drink therein to excess, all to such a degree as to distinguish it from most of the hotels in Scotland, and to cause discomfort and annoyance to the visitors to and residents in the said hotel," it was held sufficient in the counter issue to ask whether there was an excessive amount of drinking in the hotel, and whether the said hotel itself on said days was in a state of much squalid untidiness and dirt.

*M'Iver v. M'Neill*, 11 M. 777.

And again when the issue was whether the statement complained of represented the pursuer as being unfit for his post as teacher of the public school at X, and that it was the duty of the School Board to dismiss him, a counter issue simply asking whether the pursuer was unfit for his post was allowed, and it was held unnecessary to put in the counter issue the consequence whether it was the duty of the School Board to dismiss him.

*M'Kerchar v. Cameron*, 19 R. 383.

In another case the Court inserted in the counter issue the consequential part of the issue, but both LL. Mure and Shand were of opinion that the addition was unnecessary.

*Blasquez v. Lothians Racing Club*, 16 R. 893.

Counter issue  
where specific  
charge is made.

Example.

Where the accusation complained of as defamatory is a specific charge, the counter issue simply asks whether the pursuer did the thing which the defender has stated. Thus, if the defender has called the pursuer a thief, the counter issue will be: Whether the pursuer, on — day of — 189—, stole from X in his house in ——— Street, Edinburgh, a fur coat (or other specified article), and was a thief?

Where general  
charge is made.

Where the defender has made a general charge against the pursuer, it is not sufficient in the counter issue for the defender to echo the innuendo of the issue, but he must put specific cases where the thing charged was done.

*M'Rostie v. Ironside*, 12 D. 74.

p. L. Cowan—*Milne v. Bauchope*, 5 M. 1114.

Thus, where the pursuer had made certain statements in a memorial to patrons of the University, the defender had said that the pursuer lied and knew he lied. The pursuer having sued the defender for this statement, the defender was allowed a counter issue putting passages from the memorial, and asking whether the statements therein were known to pursuer to be false. Examples.

*Hamilton v. Hope*, 4 Mur. 222.

This law, however, is modified by the modern rule that a counter issue in general terms will be allowed, the proof of it being limited to the specified instances stated on record.

*Hunter v. MacNaughton*, 31 S.L.R. 713.

Again, the pursuer had been agent for the defenders, and was dismissed. About the time of his dismissal he obtained some of their goods, sold them, and did not account for their price. The defenders wrote to third parties, saying that the pursuer had behaved in a blackguard-like way, and that they considered twelve months' imprisonment too easy a punishment for him. A counter issue was allowed to the defenders on their being sued for this statement, asking whether the pursuer had fraudulently and dishonestly taken possession of the goods, had transferred them to another party, and had taken the price of them without accounting for it to or communicating with the defenders.

*Taylor v. Anderson*, 6 D. 1026.

And when the pursuer complained that the defender had called him a swindler, the defender was allowed a counter issue asking whether the pursuer, by representations which he knew to be false, had induced the defender to take shares in a specified company.

*Macleod v. Marshall*, 18 R. 811.

The question whether a defender can plead *veritas* to an action for holding up to public hatred and ridicule has been

Counter issues  
in actions for  
holding up to  
public hatred,  
etc.

discussed *supra*, p. 151. Though no example of a counter issue in such cases can be given, it may be suggested that a defender pleading *veritas* should propose a counter issue—Whether the pursuer (with all necessary specification as explained) said or did such and such things, and did thereby expose himself to public hatred, ridicule, scorn, and contempt.

## CHAPTER XX

### DAMAGES AND EXPENSES—THEIR AMOUNT, AGGRAVATION, AND MITIGATION

Amount of damages depends largely on the jury—Actual loss recoverable—Court will order new trial if damages awarded are excessive—Court will not interfere merely because damages are heavy—Circumstances favourable to high damages—Proof in aggravation of damages—Proof in mitigation of damages—Proof of *res gesta*—Circumstances tending towards mitigation of damages: (1) Provocation; (2) Common report; (3) Probable cause; (4) Privacy of the utterance; (5) Statement made in answer to a question; (6) Bad character of pursuer; must be attacked on record; (7) Good character of defender does not mitigate damages; (8) Proof of recovery of damages for same libel from others; (9) Want of malice; (10) Apology offered; (11) Miscellaneous — *Compensatio injuriarum* — Examples—Not now maintainable—Expenses follow damages—81 & 82 Vict. c. 100, s. 40—Effect of partial success on expenses—Effect of tender on expenses—Requisites of effective tender—Effect of order for new trial on expenses.

THE amount of damages which will be awarded in actions for defamation depends very much upon the jury before whom most cases of this nature are tried. Where actual pecuniary loss can be proved by a person to have resulted from his being defamed, there can be no doubt that he is entitled to recover such loss if he asks for it from his defamer. But where such actual loss cannot be proved, the Court is unwilling to allow heavy damages in ordinary cases, and will even order a new trial unless the pursuer agrees to accept less than the jury has awarded if its award appears excessive.

Amount of damages depends largely on jury. Actual loss recoverable.

Court will order new trial if damages awarded are excessive.

*Wright v. Outram*, 17 R. 596.

*Rilchie v. Barton*, 10 R. 813.

*Johnstone v. Dilke*, 2 R. 836.

Court will not interfere merely because damages are heavy.

But, on the other hand, the Court will not interfere with an award of damages which may seem large, though no special damage is proved, if the defamatory statement complained of was serious,

*Fletcher v. Wilsons*, 12 R. 683,

or if there is evidence of distinct *animus injuriandi*.

Circumstances favourable to high damages.

Most of the cases in the books where the amount of damages awarded is mentioned are old, many of them dating from the time when jury trial did not exist. It would be bootless to enumerate them, as they can afford no true guide to the amount which would now be allowed. The question of the amount of damages which may fairly be claimed and obtained is one dependent on the circumstances of the case.

If the accusation is serious, if it has been made with evident malignity, if it has been persisted in, if it has been made wildly and recklessly, or uttered broadcast, if it is made of an eminent man, these are circumstances which will favour the award of high damages. In fact all such circumstances as would in a case of privilege tend to show malice may be proved towards aggravation of damages.

The question was reserved in

*Friend v. Skelton*, 17 D. 548,

“whether, when it is set forth generally that the slander uttered on an occasion specially libelled had been repeated at other times and on other occasions, such repetition of the slander may be competently proved as indicating the *animus*, although not so libelled as to form matter of a separate and substantive issue.” But the question seems to have been clearly answered in the affirmative by the numerous cases where repetition of the alleged libel has been allowed to be proved as evidence of malice. See *supra*, p. 205.



It was formerly held that a pursuer would not be allowed to get a diligence for the recovery of a manuscript containing the alleged libel from the proprietors of a newspaper who had published it. See L. O.'s note.

Proof in aggravation of damages.

*Lowe v. Taylor*, 5 D. 1261.

But now such a diligence will be allowed with the view of aggravating damages if the pursuer avers that the publications by a newspaper were not *bond fide*. And thus where a newspaper published a number of anonymous letters respecting the pursuer, and he averred that the letters although bearing to be from various correspondents were not so, but were concocted in the office of the paper, he was allowed a diligence to recover the letters in proof of his averment in aggravation of damages.

*Cunningham v. Duncan*, 16 R. 383.

But in England it has been held that the pursuer is not entitled to discover who the author is where the publisher has accepted liability,

*Gibson v. Evans*, L.R. 23 Q.B.D. 384,

and this appears to be the sounder view.

But where a pursuer suing a newspaper said nothing on record about the circulation of the newspaper in a particular town, he was not allowed a diligence to recover the defender's books with the object of showing the circulation in that town.

*British Publishing Co., Limited v. Hedderwick*, 19 R. 1008.

"Anything in palliation" (as distinguished from justification) "may be proved without a counter issue." *p. L. Jeffrey*.

Proof in mitigation of damages.

*Lowe v. Taylor*, 7 D. 117;

if relevantly averred. *p. L. P. McNeill*.

*McDonald v. Begg*, 24 D. 685.

Without a counter issue "you may lead evidence of the *res gestæ* and as to the mode in which the calumny was uttered" in diminution of damages. *p. L. P. Boyle*.

Proof of *res gestæ*.

*White v. Clough*, 10 D. 332.

But a person who publishes a libel and will not give up the name of his correspondent cannot prove the facts and circumstances known to his correspondent in mitigation of damages against himself.

*Browne v. M'Farlane*, 16 R. 368.

Though if the libel were contributed by a regular agent, the decision might be otherwise. Indeed this decision requires reconsideration. If a newspaper proprietor is to be responsible for the defamatory utterances in his paper which are supplied to him by his correspondents, it is only justice that he should be able to support himself with the knowledge at their disposal.

It is quite settled that all facts which tend to remove the idea that deliberate malice actuated the defender in making the defamatory statement complained of, or which tend to lessen its possible evil effects on the pursuer's reputation, may be proved by the defender in mitigation of damages. The principal circumstances which will tend to diminution of damages are :—

Circumstances  
tending  
towards miti-  
gation of  
damages.  
(1) Provoca-  
tion.

(1) That the pursuer was provoked to make the utterance complained of. Thus, when the defender had written charging the pursuer with having committed a crime which was punishable with the gallows, he did not plead *veritas*, but proposed to lead evidence of his maid-servant to show that the pursuer had tried to ravish her, and that it was in view of these circumstances that the defender wrote the letter complained of. The defender was allowed to lead the evidence, and the L. J. C. Boyle said: "The defence is not 'I will prove that a capital crime was committed,' but that 'circumstances occurred which go to palliate the offence of the letter having been written.'"

*Ogilvie v. Scott*, 14 S. 729.

The question how far provocation justifies was discussed first of all in

*Scotlands v. Thomson*, M. App. Delinquency 3.

It certainly does not justify defamation, but it operates towards mitigation of damages, as the case of *Ogilvie* undoubtedly indicates. Since that case, a defender has been allowed to lead evidence that he had been provoked by a slander uttered by the pursuer about him.

*Bryson v. Inglis*, 6 D. 363.

And the L. J. C. Hope in

*Tullis v. Crichton*, 12 D. 867,

expressly held that provocation could be proved in mitigation of damages, but that provocation and *compensatio injurarium* are different. And it has been decided that when the defender had written letters accusing the pursuer of having threatened to murder the defender, the latter could prove that he had heard reports that the pursuer was threatening him with personal violence, in mitigation of damages.

*Paul v. Jackson*, 11 R. 460.

(2) That the alleged defamatory statement was generally reported about the country. Formerly it was held that when there was no evidence of *animus injuriandi* on the part of the defender, he would not be liable in law for a piece of idle and transient indiscretion from which no prejudice had ensued. Thus a defender had repeated a charge of drunkenness against a minister which was in general circulation in the town. There was, however, no evidence that she had taken pains to disseminate the report, and she had only talked of it in her house as a bit of ordinary intelligence. She was held not liable. (2) Common report.

*Rose v. Robertson*, Hume 614.

And a similar decision was given in.

*Gardner v. Marshall*, Hume 620.

But it is extremely doubtful whether in such circumstances nowadays such facts would be held to entitle the defender to a verdict, though the damages against him might be nominal. Proof, however, is always allowed in mitigation of

damages to the effect that the defender had only repeated what another had told him,

*Durham v. Mair*, Hume 599,

or that the matter was common talk,

*M'Kennal v. Wilson*, Hume 628.

p. L. J. C.— *Scott v. M'Garin*, 2 Mur. 484.

p. L. P. Hope— *Marshall v. Renwicks*, 13 S. 1127.

*M'Culloch v. Litt*, 13 D. 960.

But the proof of the *veritas* of the statement can only be allowed if a counter issue is taken, and operates not in mitigation but in absolution from damages.

(3) Probable  
cause.

(3) That the defender had probable cause for making the statement. Thus it was held that the defender might lead evidence to show that statements he had made were made on reasonable grounds.

*Forteth v. E. of Fife*, 2 Mur. 463.

And in an action against a man for having said that the pursuer had knowingly uttered forged notes, the defender was allowed to lead evidence that there were such *extant* as showing probable cause for his making the accusation.

*Gibsons v. Marr*, 3 Mur. 258.

It must, however, be admitted that such general evidence as was allowed in this case could hardly establish probable cause for making a specific accusation against an individual.

(4) The privacy  
with which the  
statement was  
made.

(4) That the defender made the statement with some degree of privacy may be an element in mitigating damages. Thus, in charging the jury, the L. C. C. Adam said: "In considering the damage you will take into view that the statements were not published to the world, but in letters to the Lord Lieutenant and M.P."

*Tytler v. Macintosh*, 3 Mur. 236.

But probably the more correct view to take is that the privacy of the statement does not tend towards mitigation of damages, but the publicity of it towards aggravation.

(5) That the statement was not made ultroneously but in answer to a question. "Not being a voluntary communication but in answer to a question makes no difference in the question of publication, whatever it may do on the amount of damages." *p. L. C. C. Adam.*

(5) Statement made in answer to question.

*Gibsons v. Marr*, 3 Mur. 258.

(6) That the pursuer's character is bad, and that therefore he cannot sustain the same amount of injury from the libel as would one whose character is good. Though the fact that the pursuer's character is bad cannot justify a person in saying what is false and calumnious about him, it is relevant to prove that owing to his bad character, the libel cannot have serious effect on him. "The *quantum* of damages depends in some degree on the character of the pursuer." *p. L. C. C. Adam.*

(6) Pursuer's character is bad.

*Hyslop v. Staig*, 1 Mur. 15.

"He" (the defender) "might, however, without an issue have proved that the thing was generally propagated before he stated it, or that the pursuer was of such a character as not to be injured by such a statement." *p. L. C. C. Adam,*

*Walker v. Robertson*, 2 Mur. 508,

and general reputation could be proved.

*Kingan v. Watson*, 4 Mur. 485.

It would seem competent to ask a witness whether he thought the pursuer could be guilty of such conduct as was charged against him in the libel,

*Tytler v. Macintosh*, 3 Mur. 236,

but incompetent to ask a witness if he suspects the pursuer of being guilty of the act with which he complains being charged,

*Kingan v. Watson*, 4 Mur. 485.

In mitigation of damages for saying that the pursuer was one of the worst characters the defender ever knew, the defender was allowed to prove that at a period after the time to which

the defender referred, the pursuer was convicted of a breach of his public-house certificate by allowing women of ill-fame to assemble on his premises.

*M'Donald v. Begg*, 24 D. 685.

In view of these decisions the doubt entertained by the Court in

*Burnaby v. Robertson*, 10 D. 855,

whether the truth of charges quite different from that complained of may be proved in mitigation of damages, may be held as answered; and it may be stated that the truth of such different charges may be proved, provided that they tend to show the bad character of the pursuer, and the unlikelihood of his being seriously injured by the statement complained of.

Character of  
pursuer must  
be attacked on  
record.

The defender will not, however, be allowed to lead evidence as to the character of the pursuer if he has not attacked it on record, and the pursuer has not led evidence in support of it.

*Bryson v. Inglis*, 6 D. 363.

But it seems doubtful if the latter part of this ruling can be supported. It is fair that the defender should have to give the pursuer notice, by statements on record, that the pursuer's character will be attacked, but it hardly seems reasonable that the defender should, after he has done so, be debarred from leading his evidence on the point merely because the pursuer takes care to lead none in support of his character.

A pursuer is under no obligation to prove his character unless it is attacked on record by the defender. If, however, the pursuer leads evidence as to his character, it not being attacked on record, the defender will then be entitled to lead evidence against the pursuer's character.

(7) Good character of defender does not mitigate damages.

(7) That the defender's character is good, is no reason for mitigating damages.

*Scott v. McGavin*, 2 Mur. 484.

(8) In England it is provided by statute that in actions for defamation against newspapers, they can prove, in mitigation of damages, that the pursuer has already recovered damages, or is suing for them, against other newspapers for the same libel, or has agreed to accept compensation from other papers for it. (8) Proof of recovery of damages for same libel from others.

51 & 52 Vict. c. 64, s. 6.

No such provision exists in Scotland, though it is desirable that it should, and it is doubtful whether at common law evidence to this effect would be allowed. The only damages the pursuer is properly entitled to are those caused by the defender's act. They cannot be more or less because some one else has done the pursuer damage and paid him for it. On the other hand, it is certain that no greater benefit can be bestowed on the unscrupulous than that they should be libelled by several newspapers quite innocently; and it is no function of the law to legally reward vice at the expense of virtue. It therefore seems desirable that there should be some means of preventing persons from making capital out of libels on themselves.

(9) A defender is entitled to prove the circumstances in which the defamatory matter complained of was uttered in order to show that there was no malice in the utterance of it. (9) Want of malice.

*Smith v. Scott*, 2 C. and K. 580.

*Pearson v. Lemaitre*, 5 M. and Gr. 700.

(10) In England a defender can also prove in mitigation of damages that he has timeously offered an apology. (10) Apology offered.

6 & 7 Vict. c. 96.

Though this is a statutory provision, there seems no reason why in Scotland at common law such evidence should not be allowed.

(11) Other grounds than those before enumerated for mitigating damages are of course conceivable, but the principal (11) Miscellaneous.

have been stated. On one occasion the Court reduced damages because the pursuer had, when the offer was made, refused to submit the case to arbitration instead of going into Court with it.

*M'Leans v. Grays*, Hume 604.

But there are many cases where the pursuer would be quite justified in refusing the privacy generally characteristic of arbitration proceedings, and in insisting on clearing his character publicly in the Courts.

*Compensatio injuriarum.*

Although not strictly speaking a plea in mitigation of damages, it is convenient here to notice that of *compensatio injuriarum*, which used to be pleaded and sometimes with success. It was a plea to the effect that A could not recover damages from B who had libelled him, if A had libelled B equally badly. Thus a man having charged another with selling light weight, and the other having retorted with a similar charge, the defender was assolizied.

Examples.

*Robertson v. Falconer*, Hume 603.

In another case the plea was given effect to where one party had said that the other was a swindler, who ought to be put in jail, and the other had retorted that the former was a "take in."

*M'Guffie v. M'Donnell*, Hume 638.

In another case the plea was sustained between parties who had respectively called the other "a damned mis-sworn tyke or dog," and "a damned liar and a thief."

*Forbes v. Young*, Hume 627.

Again, where the defender had said that the pursuer had deserted his wife and committed adultery, the Court sustained the plea, because the pursuer had written abusive letters to the defender.

*Lovi v. Wood*, Hume 613.

And it was also held that injurious statements in pleading before an arbiter, inserted by the pursuer, may be a complete



set off to a claim of damages on account of a statement also made in the pleadings by the defender.

*Goddard v. Haddaway*, 1 Mur. 156.

On the other hand, it was held that an accusation against a provost of "unscrupulous rapacity to which the oath of "calumny and every other consideration gave way; of stealing what he knew to be the property of the town; as "guilty of oppression, rapine, and breach of trust," was not compensated by the provost having called the person who made these accusations "a drunkard and a licentious "man."

*Robertson v. Rose*, Borth. 340.

Where the defender had called the pursuer a "whore," and the pursuer had said the defender was a scoundrel for doing so, the Court held there was compensation, but Hume doubts the decision.

*Allan v. Douglas*, Hume 639.

There is something comical in a bench of judges discussing the comparative objectionableness of such terms as "whore" and "scoundrel." The decisions given in some of these cases may be justified on the ground that the words were really uttered in mutual "flytings" or "logomachies," as the late Lord President Inglis described them; but they cannot be justified on the plea of *compensatio injuriarum*.

But the fact that the proper mode of treating mutual actions for defamation was not by sustaining pleas of *compensatio injuriarum* dawned on the bench practically with the introduction of jury trial. In

Not now maintainable.

*Hyslop v. Miller*, 1 Mur. 43,

it was laid down that it is not a bar to an action for defamation that the pursuer has retorted with abusive language; but the abuse may be so nearly balanced as to be a complete set-off. And, finally, it was decided that where both parties complained of defamatory utterances, each

by the other, the proper method is for each to raise a separate action, and, if both obtain damages, to set off, so far as they can, the damages obtained in the one against those obtained in the other.

*Tullis v. Crichton*, 12 D. 867.

See also the L. C. C. Adam, p. 387, in

*Edwards v. Macintosh*, 3 Mur. 369.

Expenses follow damages.

As a rule the pursuer is entitled to his expenses if he obtains damages though they be nominal, and it has even been questioned if this rule is not inflexible.

*Gardner v. Mackenzie*, 8 D. 859.

*Rae v. M<sup>r</sup> Lay*, 15 D. 30.

*Craig v. Jex Blake*, 9 M. 973.

It has been applied even where the pursuer has only obtained  $\frac{1}{4}$ d. damages, and where there being counter actions, the pursuer had offered to retract if the defender would do so.

*Arrol v. King*, 18 D. 98.

31 & 32 Vict. cap. 100, sec. 40.

The rule has been somewhat modified by statute, the Court of Session Act 1868, 31 & 32 Vict. cap. 100, sec. 40, enacting: "Where the pursuer in any action of damages in the Court of Session recovers by the verdict of a jury less than five pounds, he shall not be entitled to recover or obtain from the defender any expenses in respect of such verdict unless the judge before whom such verdict is obtained shall certify on the interlocutor sheet . . . in the case of actions for defamation or libel, that the action was brought for vindication of character, and was in his opinion fit to be tried in the Court of Session." It now seems that in such cases the certificate of the judge cannot be interfered with. *p. L. P. Inglis.*

*Macmillan v. Wilsons*, 15 R. 6.

*Bonnar v. Roden*, 14 R. 761.

Effect of partial success on expenses.

But the pursuer, if successful in his case, is not entitled

to his expenses connected with issues on which he did not insist.

*Balfour v. Wallace*, 16 D. 110.

The pursuer loses his right to expenses from the date of a tender, if the defender makes one before the trial, of a larger sum than that awarded as damages by the jury, and in that event the defender will be entitled to his expenses from the date of the tender.

Effect of tender on expenses.

*Anderson v. Marshall*, 14 S. 54.

But to have these effects a tender must be accompanied by a retraction expressing regret and withdrawing the words, and declaring them to be false; and if the tender only expresses regret and says that the defender had no intention to convey the meaning ascribed to his words, but does not declare them false, it is not such as the pursuer ought to accept, and the defender will not be relieved of the pursuer's expenses after its date, although the jury award a less sum than that tendered.

Requisites of effective tender.

*Faulks v. Park*, 17 D. 247.

And it would seem that the Court has sometimes entertained the view that the tender must be judicial.

*Curror v. Martin*, 11 Scot. Jur. 463.

But if the tender does not admit that the slander was uttered, but retracts it, apologises for it, and declares it false if it were, it will be held sufficient to relieve the defender of the pursuer's expenses, and to entitle the defender to his expenses subsequent to its date, if the jury has awarded less damages than those tendered.

*Mitchell v. Nicoll*, 17 R. 795.

And a mere tender without any retraction may, in the discretion of the Court, be sufficient to relieve the defender from liability in expenses.

*Macfie v. M<sup>r</sup> William*, 26 Scot. Jur. 459.

Formerly when a verdict was set aside on the ground that

Effect of order  
for new trial  
on expenses.

it was contrary to law, it was held that the expenses should abide the result of the second trial, but when it was set aside as being contrary to evidence, a new trial was only allowed on the unsuccessful party paying the expenses of the first trial.

*Robertson v. Boswell*, 4 Mur. 509.

But now it would seem that in most cases the question of expenses is reserved on granting a new trial,

*Fraser v. Edinburgh Street Tramways Company*, 10 R. 264, though in exceptional circumstances the Court may order their payment as a condition of granting a new trial.

*Neville v. Clark*, 2 M. 625.

## CHAPTER XXI

### PROVINCE OF JUDGE AND JURY, AND PROCEDURE IN ACTIONS FOR DEFAMATION

Actions for defamation tried before juries in Court of Session—But occasionally by judge alone—Province of judge and jury—I. Questions of law for the Court: (a) Court controls manner in which case shall be conducted; can order libellous passages to be expunged from record; motion to have defamatory passage expunged; Court will punish those using improper language before it; Court's jurisdiction extends over parties outside the Court; and over persons not parties to a cause; person, not a party, aggrieved by statements made in cause; contempt of court—(b) Court decides on relevancy of the record: (1) Pursuer's averments necessary for relevancy: (a) That defender uttered defamatory statement of pursuer; Court sole judge whether statements complained of can be defamatory; Court will not allow trial on vague averments of utterance complained of; (β) Pursuer must specify time, place, and persons; averment of repeated defamation; publication to person defamed is sufficient; (γ) Pursuer must aver that the defamatory matter is untrue; (δ) In privileged cases pursuer must aver malice, etc.; generally Court decides whether case is privileged; Court may decide on record whether there was probable cause; what constitutes malice and want of probable cause is for Court; whether it existed is for jury:—(2) Defender's averments; principal defences: (a) Irrelevancy; (β) No title to sue; (γ) Denial; (δ) Privilege; (e) Veritas; (f) *Compensatio injuriarum*; (η) Statement uttered in *rixa* or retort; (θ) That statements were uttered in confidence is not a good defence; (i) *Mora*; (κ) *Res judicata*; (λ) *Lis alibi pendens*; (μ) Waiver and accepted apology; (ν) Bankrupt pursuer; (ρ) Excessive damages—(c) Court settles form of issue and counter issue—(d) Court decides what evidence may be submitted to the jury—Utterance proved must be that complained of—Evidence of utterance in foreign language—Single witnesses to separate utterances—Utterance must be proved to have been made to some of parties specified—*Comparatio literarum* to prove authorship—Defender may set up his character if attacked by pursuer—(e) Judge's duties at the trial; judge may tell jury there is no evidence to support case—(f) Court applies verdict; ambiguous

verdict—(g) Procedure subsequent to verdict given is in hands of the Court; New trial; grounds for granting—(1) Verdict contrary to evidence; (2) Misdirection of judge; (3) *Res noviter*; (4) Surprise; (5) Irregularities by jury; (6) Ambiguity in verdict; (7) Excessive damages—II. Questions of fact for the jury—Jury decides whether words were uttered by defender of pursuer, and whether they are defamatory—Jury decides whether innuendo is proved—Jury decides whether malice and want of probable cause existed—Jury assesses damages.

Actions for defamation tried before juries in the Court of Session. But occasionally by judge alone.

WHEN actions for defamation are brought in the Supreme Court, they are, in virtue of their being among the enumerated causes appropriated to be tried by jury by 6 Geo. IV. cap. 120, sec. 28, usually tried in that manner, though if questions of law and fact are much mixed up they may be tried by a judge without a jury.

*Auld v. Shairp*, 2 R. 940.

It must, however, be observed that in that case both parties were willing to submit to the Court's decision as to how the case should be tried, and it is extremely doubtful whether the Court would order proof before a judge instead of jury trial if either party—and particularly if the pursuer—objected to its being so dealt with.

*Rhind v. Kemp*, 1 S.L.T. 367.

Province of judge and jury.

Cases of defamation being thus tried before a composite tribunal of judge and jury, nice questions frequently arise as to the proper provinces of each. It is often broadly laid down that the province of the judge is to expound the law of the case to the jury, and of the jury, accepting the law as thus laid down, to apply it to the facts of which they are the arbiters, and thereafter to give their verdict. But although this is a substantially accurate statement, the question remains behind it, what are, in law, questions of law for the judge and questions of fact for the jury?

I. Questions of law for the Court.

I. Questions of law for the judge. There is no dispute that the judge (a) has exclusive control over the procedure in the case; (b) decides on the sufficiency, or, as it is termed, the

relevancy of the record to allow the pursuer to go to trial, or to allow the defender to maintain a defence ; (c) settles the form of the issues and counter issues which are to be laid before the jury, and on which they have to give their verdict ; (d) decides on the evidence which may be submitted to the jury ; (e) gives the directions in law to the jury ; (f) applies or gives effect to the jury's verdict ; and (g) regulates the procedure subsequent to the verdict being given, including the question whether a new trial should be granted.

(a) The judge having exclusive control over the manner in which the case shall be conducted, decides all questions of procedure in the case, and has the right to correct any irregularities which may be committed by any person connected with it, either as party, counsel, agent, witness, or jurymen, and even by persons who are not connected with the case, but who do anything that may prejudice its due consideration. He has therefore the power to order libellous passages in the record to be expunged, if, either on his own initiative, or on the motion of either party, he should deem the passage not sufficiently definite to be pertinent or relevant.

(a) Court controls manner in which case shall be conducted.

Can order libellous passages to be expunged from record.

*Steele v. Steele*, 13 S. 1096.

*Herdman v. Young*, M. 13987.

Though the Court has this power it should be exercised only in clear cases. On one occasion the Court ordered a passage in a reclaiming note, suggesting deception, to be expunged. The party who had inserted it appealed to the House of Lords, and Lord Eldon there expressed the opinion that for the purposes of justice great latitude of allegation must be allowed to counsel in pleading, and if the allegations were pertinent he doubted extremely whether they ought to be expunged merely because they might be unfounded.

*Robertson v. Graham*, 3 Dow's App. 273, 15 R.R. 76.

If one of the parties to a case applies to have a passage

Motion to have defamatory passage expunged.

deleted, he should do so by motion and not by a separate representation, *i.e.* a petition and complaint. *p. L. Balgray.*

*Mackintosh v. MacTavish*, 6 S. 994.

Court will  
punish those  
using improper  
language  
before it.

There is a considerable number of cases reported in the older books where the Court not only ordered deletion of objectionable passages, but also punished by fine or imprisonment those inserting them, and also of cases where the Court imposed penalties for improper language used before it. Thus the Court punished an agent by imprisoning him, and barring him from practice in the Court, for "indecent and indiscreet" expressions used by him in a postscript to a petition.

*Cannon v. L. Stair*, 4 B.S. 510.

And, in another case, the Court not only ordered the deletion of improper passages, but also fined the party inserting them.

*Herdman v. Young*, M. 13987.

In an old case litigants were sent to the Tolbooth for falling to words of abuse in presence of the Lords.

*Cavers*, 4 B.S. 666.

And, in another, an agent was sent to the Tolbooth for threatening an advocate for words he had used in a cause.

*Lockhart v. Goldie*, M. 359.

Court's jurisdiction extends over parties' actions outwith the court.

The jurisdiction of the Court extends not only over the actions of parties in the Court, but also over what they do outside the Court, with reference to the case. Thus the writing of letters relative to a cause during its dependence, to judges, M.P.'s, and other public and private individuals, or the circulation of statements regarding it, is a contempt of Court which may be punished with fine and imprisonment,

*Lord Advocate v. Hay*, 1 S. 288.

*Henderson v. Laing*, 3 S. 384.

*Gilfillan v. Ure*, 3 S. 21.

*Miller v. Mitchell*, 13 S. 644.

*Smith v. Mitchell*, 14 S. 172.

*Macleod v. Justices of the Peace of Lewis*, 20 R. 218.



And it is none the less so, that the person to whom the letters or statements are addressed is the opposing party.

*Paterson v. Kilgour*, 3 M. 1119.

At one time it seems to have been held incompetent for a party to an action to complain summarily of a person's actions with regard to the cause, the person not being himself a party to it.

And over persons not parties to a cause.

*Bell v. Stewarts*, 1 S. 271.

But it has long been the custom for the Court to entertain complaints by a party to a cause against acts of third parties, which are considered prejudicial to the fair trial of the case.

*Maclauchlan v. Carson*, 5 S. 147.

*Macleod v. Gunn*, 20 R. 218.

*Smith v. Ritchie*, 20 R. (J.C.) 52.

If a person, not a party to a cause, considers himself aggrieved by any statement on the record, it seems quite competent for him to compare by minute and ask for the deletion of the objectionable matter, though the Court would be very unwilling to entertain such an application unless the matter complained of was clearly not relevant or pertinent to the cause. The refusal by the Court to order the deletion of such a passage would, however, in no way prejudice the right of the person complaining of it to bring an action for judicial slander against the person who put it on record.

Person not a party aggrieved by statements made in cause.

The Court has also full power to deal with insults to itself, whether they be by disobedience to its orders,

Contempt of Court.

*Muir v. Kerr & Milligan*, 6 M. 1125,

*Leys v. Leys*, 13 R. 1223,

or by direct insult to the judges.

*Lord Advocate v. Jamieson*, 1 S. 285.

(b) The judge has also sole control over the form of the record, and decides whether it is relevant to allow the pursuer to go to trial, or the defender to maintain his defence. It is not part of the subject to expound the Scottish system of

(b) Court decides on relevancy of the record.

Supreme Court procedure. It is enough to say that both the pursuer and the defender must state on record, not the minute details, but the general features of the case which they respectively propose to prove, the one in support of his claim, the other in answer to it. If the pursuer does not set forth on record a case which, if he can prove it, would in law entitle him to prevail, the Court will not allow him to proceed to a trial at which, if he proved all he avers, he could not succeed in his claim. But in judging of the relevancy of the pursuer's record, the Court cannot look at the defender's answers. And even when the defender has put in a statement of facts in addition to defences, and the pursuer has not answered it, the Court will not dispose of the case on the ground that the statement of facts makes the pursuer's case irrelevant.

*Gunn v. Melrose*, 2 S.L.T. 56.

On the other hand, the Court will not oblige a pursuer to go to trial, if he has stated a relevant claim, if the defender has not stated a defence which, if proved, would be an answer to the claim. In such a case the pursuer is entitled to a decree in his favour without being put to the trouble of a trial, unless the defender insists on having the damages payable by him assessed by a jury.

In these circumstances the judge has sole right to decide on the relevancy of the record, and the sufficiency of both the pursuer's and defender's averments.

(1) Pursuer's  
averments  
necessary for  
relevancy.

(1) Pursuer's averments. In actions for defamation the necessary averments on record to make the pursuer's case relevant, and to therefore entitle him to have the case brought before a jury, are (a) that the defender uttered of the pursuer a defamatory statement; (β) when, where, and to whom he uttered it; (γ) that the statement is false; and (δ) in privileged cases that the statement was uttered maliciously, and in some cases without probable cause.

(a) The defender must be a person liable to be sued for the libel complained of. Who such defenders are has been explained *supra*, p. 20. If, therefore, the pursuer brings an action for defamation against a person who is not in law liable, and this fact appears on the pursuer's record, the action will be thrown out by the Court. But if the non-liability does not appear on the pursuer's record, the case will go to trial, if there is no other reason for throwing it out, and at the trial the defender may prove his non-liability.

(a) That defender uttered defamatory statement of pursuer.

The pursuer must further aver that the defender has made or caused to be circulated a defamatory statement about him. *p. L. Adam.*

*Jack v. Fleming*, 19 R. 1.

Again, it has been explained *supra*, p. 34, what are defamatory statements. The Court is judge of whether the statements complained of, if proved, can be defamatory. *p. L. C. Adam,*

Court sole judge whether statements complained of can be defamatory.

*Hamilton v. Stevenson*, 3 Mur. 75.

*Leslie v. Blackwood*, 3 Mur. 157.

*p. L. C. C. Adam—Tytler v. Mackintosh*, 3 Mur. 236.

*p. L. C. C. Adam—Alexander v. Macdonald*, 4 Mur. 94.

And the Court will not allow a case to go to trial if a verdict for the pursuer would plainly have to be set aside on a motion for a new trial. *p. L. Adam.*

*Gray v. Scottish Society for Prevention, etc.*, 17 R. 1185.

It is true, as stated by the Lord Justice-Clerk Hope in

*Kennedy v. Baillie*, 18 D. 138,

that libel or no libel is a question for the jury. See also

*p. L. Adam—Waddell v. Roxburgh*, 31 S.L.R. 721.

But the Court has first of all to decide whether the statements are reasonably capable of having a defamatory meaning. "The Court must be satisfied that upon a sound and fair construction the words will bear the meaning assigned, and if so, whether they are actionable or not; otherwise the pursuer will have

"it in his power, by arbitrarily interpreting the words complained of, to make any words, however truly incapable of bearing the meaning attributed to them, a sufficient ground for instituting the action and having it sent to a jury." *p. L. Wood.*

*Mullar v. Robertson*, 15 D. 170.

"It is for the Court to say whether the words complained of on any fair construction of their terms can be considered libellous." *p. L. J. C. Hope.*

*Kennedy v. Baillie*, 18 D. 138.

But the Court will not withhold a case from a jury unless it is satisfied that the innuendo put upon the words is unreasonable.

*Waugh v. The Ayrshire Post, Limited*, 21 R. 326.

These quotations establish two distinct matters as being within the province of the Court. *First*, to decide whether words which are complained of as defamatory can, in the natural meaning, reasonably be held to be so; and *second*, to decide whether if in their natural meaning they are not defamatory, an innuendo is properly stated by the pursuer which is reasonable, and would give them a defamatory meaning. Thus L. Shand laid it down in

*Godfrey v. Thomsons*, 17 R. 1108,

that it is the province of the Court to interfere to prevent unreasonable constructions being put on words. And L. Adam in

*Bruce v. Leisk*, 19 R. 482,

stated that it is for the Court to say whether upon a reasonable construction the words can bear the innuendo. It follows that the Court will not allow a pursuer to go to trial on a vague averment of the utterance of which he complains. Thus if the pursuer complains of a letter and does not produce it, and only makes vague statements as to its contents, he will not be allowed to go to trial on it.

*Stephen v. Paterson*, 3 M. 571.

Court will not allow pursuer to go to trial on vague averments as to the defamatory matter uttered.

And when the pursuer averred that the defender had accused him of circulating statements of a defamatory and incriminating character, and of being the author or writer of lewd and immoral language, he was not allowed to go to trial, as his averment left it open to prove any statement which the pursuer would so describe, and was therefore indefinite.

*Milne v. Smiths*, 20 R. 95.

The pursuer must also produce the writing complained of, if it be extant, and obtainable,

*Rose v. M'Leod*, 3 S. 79.

It is useless to multiply examples, as the great majority of discussions on the relevancy of the record turn on the questions, either whether the words are in themselves defamatory, or whether the innuendo put upon them is reasonable.

(β) The pursuer must specify the time when, the place where, and the persons (or some of them) to whom the defamatory matter was uttered, and if he does not do so his action will be dismissed as being vague. (β) Pursuer must specify time, place, and persons.

*Rose v. M'Leod*, 1 S. 112.

*James v. Watkins*, M. 3432.

*Paterson v. M'Neill*, Borth. 375.

*Stein v. Marshall*, 13 F.C. 309; aff. 1 Mor. App.

Proof No. 1.

*Richardson v. Walker*, Hume 623.

*Crichton v. Forest*, Hume 635.

Thus it was held that if a person complains of a statement made at a Parochial Board he must specify the names of some of those present when it was uttered.

*Campbell v. Menzies*, 17 D. 1132.

Again, an averment that the slander was uttered on ten specified days of April, "or on one or more days of that "month," . . . "within Newhaven and its immediate

"neighbourhood," in presence of persons named, "or one or more of the said persons," was held irrelevant.

*Bisset v. Ecclesfield*, 2 M. 1096.

And when it was averred that the slander was uttered "in or about the year 1861" the statement was held too vague, but when narrowed to a particular month was sustained.

*Stephen v. Paterson*, 3 M. 571.

An averment of slander uttered during one or other of the days of a specified month was held sufficient in the previous case of

*White v. Clough*, 10 D. 332.

And again it was held irrelevant to propose to prove that the slander was uttered on various occasions between the 4th and 7th May, at various places in the city of Edinburgh, in presence of certain persons named, or of one or more of them.

*Walker v. Cumming*, 6 M. 318.

In another case where the pursuer proposed to prove that the matter complained of was uttered "in the month of May, June, or July 1868," the Court obliged him to tie himself down to one month. The Court refused to allow him to prove a case of alleged slander uttered "in the latter end of summer or beginning of harvest 1869."

*Grant v. Fraser*, 8 M. 1011.

And when the pursuer proposed to prove that in or about a certain month in various places in or about the parish of B., in presence of X, Y, Z, etc., the defender uttered the slander, the Court refused to allow him to do so on the ground of the vague nature of the averment.

*Anderson v. Hunter*, 18 R. 467.

Averment of repeated defamation.

But if an averment is made of a continued repetition of the slander over a period of three months in a specified place to persons named, the Court will hold it sufficient specification.

*Lockhart v. Cumming*, 14 D. 452.

And if the pursuer states times and places when and where the slander was uttered, he will then, if he avers it, be allowed to prove generally that within a period of three months it was repeated.

*Innes v. Swanson*, 20 D. 250.

*p. L. J. C. Patton—Walker v. Cumming*, 6 M. 318.

It is sufficient in our law to state that an alleged libel was communicated to the pursuer alone.

Publication to person defamed is sufficient.

*Paul v. Jackson*, 11 R. 460.

*Stuart v. Moss*, 13 R. 299.

*Ramsay v. MacLay*, 18 R. 130.

And though the difficulty of proving a slander or spoken statement made to the pursuer alone seems great, the pursuer will be allowed to attempt its proof.

*Mackay v. M'Cankie*, 10 R. 537.

(γ) The pursuer must also aver that the statement of which he complains is untrue.

(γ) Pursuer must aver that the defamatory matter is untrue.

*Campbell v. Ferguson*, 9 R. 467.

*Gray v. Scottish Society, etc.*, 17 R. 1185.

These cases clearly establish the rule, and little doubt can be entertained that it is salutary. The single observation, however, which naturally occurs is that as the law presumes the falseness of what is defamatory, at any rate in unprivileged cases, it is curious that an averment of falsehood should be required about what is by law presumed false. The case is different when the ground of action is not that the words are defamatory but that they constitute a verbal injury. In the latter case there is no presumption of their falsehood, and an averment that they are untrue is in such a case from every point of view a prerequisite to founding an action on them.

(δ) In cases of privilege where the privilege is apparent on the record, the pursuer must state on record, as explained *supra*, p. 192, that the defender uttered the statement malici-

In privileged cases pursuer must aver malice, etc.

ously, and also, in certain cases, that it was made without probable cause.

Generally for court to decide whether case is privileged.

It is generally within the province of the Court to decide whether a case is privileged or not. *p. L. C. C. Adam.*

*Maclean v. Fraser*, 3 Mur. 353.

*p. L. Moncreiff*, p. 1150—*Torrance v. Leaf*, 13 S. 1146.

But the decision of that question depends sometimes upon findings in fact which are within the province of the jury. Thus when the privilege of fair criticism, or report, or retort is pleaded, it may be for the jury to decide on the fairness, and if they find the criticism, report, or retort fair, it is for the Court to give effect to the privilege. But even in these cases the Court will exercise a discretion, and will not send a case to a jury if it thinks the matter complained of fair criticism, report, or retort.

*Gray v. Society for Prevention, etc.*, 17 R. 1185.

*Brodie v. Dowell*, 2 S.L.T. 9.

*Dixons v. Murray*, 1 S.L.T. 494.

The Court will not decide on the record that a defender is privileged unless the privilege appears on the face of the pursuer's statement on record.

*Lockhart v. Cumming*, 14 D. 452.

• Court may decide on record whether there was probable cause.

If a case is privileged and want of probable cause requires to be alleged, the Court may judge of whether there was or was not probable cause for the defender's statement, and if it decides that there was, it can throw out the case.

*Craig v. Peebles*, 3 R. 441.

But while "what will constitute probable cause is a question of law for the Court," *p. L. Kinloch*,

*Urquhart v. Dick*, 3 M. 932,

the question of whether probable cause in the legal sense existed in a particular case is eminently one for the jury, see *L. Ivory*,

*Smith v. Green*, 15 D. 549,



though, as just stated, where its existence is obvious on record, the Court will not remit the question to a jury. *Craig*.

Similarly what constitutes legal malice is a question for the Court, though whether it existed on a particular occasion is one for the jury.

What constitutes malice is for the Court. Whether it existed is for jury.

*p. L. C. C. Adam—Maclean v. Fraser*, 3 Mur. 353.

*Anderson v. Wishart*, 1 Mur. 429.

*p. L. Ivory—Smith v. Green*, 15 D. 549.

*p. L. Benholme—Bell v. Black*, 38 Scot. Jur. 412.

*p. L. Mure—Ritchie v. Barton*, 10 R. 813.

(2) The defender's averments. If a defender fails to set forth a defence on record which, if proved, would relieve him of liability for the statements complained of, and the pursuer's record is relevant, the Court might, unless the defender insisted on having the damages payable by him assessed by a jury, dispose of the case in the pursuer's favour without sending it to a jury. Few cases, however, come into Court without relevant defences of some sort being pleaded, however often the defences break down. It is therefore necessary to consider the defences which may be pleaded to an action for defamation. Some of them may be sustained without trial, on a consideration of the record. Others can only be established after evidence has been led. But, as the record may be, in some cases, in such a condition as to compel the case to go to trial even when defences are pleaded which would usually obviate trial, there is little use of attempting to group defences under these two categories. The chief defences to an action for defamation are—

(2) Defender's averments.

Principal defences.

(a) Irrelevancy. This plea is often vaguely used to cover anything not pleaded specifically. More properly, however, it is used to mean that the pursuer has not stated those points requisite to a relevant record, which have been discussed *supra*, p. 262. It must, however, be noticed that a defender, besides pleading irrelevancy, should also put on

(a) Irrelevancy.

record precise pleas directed against the particular objection to the pursuer's record. Thus he may plead that the case is irrelevant because the language complained of is not defamatory or because the pursuer's record is wanting in specification.

(β) No title to sue.

(β) No title to sue. As practically any person complaining of his having been defamed has a title to sue the defamer, *supra*, p. 14, this is a rare plea in defamation cases. Almost the only conceivable instances in which a person has no title to sue are when the language complained of is either not defamatory or has not been uttered concerning him. In both these instances the defender would not plead no title to sue, but would plead in the former on the relevancy and in the latter on the fact.

(γ) Denial.

(γ) Denial. If the defender denies that he uttered the words, or that he uttered them about the pursuer, that, if proved, is an absolute and complete defence.

(δ) Privilege.

(δ) Privilege. This should be pleaded specifically and not merely under the plea of irrelevancy. It is necessary for the defender to set forth the facts in his defences on which his plea of privilege rests, unless the privilege is clear on the pursuer's record.

*Smith v. Green*, 15 D. 549.

But although it was ruled that the defender must either admit having uttered the words complained of, or state what he did say,

*Fraser v. Wilson*, 13 D. 289,

in order to entitle him to plead privilege, this decision seems of doubtful authority, *supra*, p. 195.

(ε) *Veritas*.

(ε) *Veritas*. This, although a species of privilege, should be separately pleaded. Although it seems competent for a defender to deny the use of the language complained of, and yet to plead *veritas* if he did utter it,

*Mason v. Tait*, 13 D. 1347,

it is incumbent on the defender to state in his defences the

precise facts which he offers to prove the truth of, and thereafter to take a counter issue asking whether these facts are true.

(γ) *Compensatio injuriarum* is now not a valid defence, (δ) *Compensatio injuriarum*. *supra*, p. 253.

But (η) a plea that the language was used in *riza* or retort is often sustained, *supra*, pp. 89, 90. (η) Statement uttered in *riza* or retort.

(θ) "Neither is it a defence that the letters were written confidentially, because if the letters applied to the pursuers they are actionable, though they had remained with those to whom they were addressed." p. L. C. C. Adam. (θ) That statements were uttered in confidence is not good defence.

*Cooper v. Mackintosh*, 3 Mur. 357.

And the proposition that it is not a valid defence, that the defamatory matter was published by breach of confidence, is supported also by

*M'Candies v. M'Candie*, 4 Mur. 197.

(ι) *Mora*. That the pursuer, in full knowledge of the utterance of the defamatory matter, has delayed for a long period to bring his action, may operate as a bar to his being allowed to go on with it. But whether it will or not is purely a question of circumstances. Thus it was held that the pursuer was not barred by a delay of five years from bringing his action in (ι) *Mora*.

*Dallas v. Little Gilmour*, Hume 632.

In another case the question of how far *mora* acted as a bar was raised but not decided.

*Stewart v. Buchanan*, 1 Mur. 34.

And in another case, a pursuer was held to be debarred by a delay of seven years.

*M'Donald v. M'Donald*, Borth. 388.

(κ) *Res judicata*. If the pursuer has once recovered damages in respect of the utterance of defamatory matter, he cannot raise another action against the same defender, (κ) *Res judicata*.

founding on other utterances of the same defamatory matter made prior to the one for which he recovered damages.

*Bruce v. Duncan*, Hume 596.

And if a pursuer sues a defender, a medical man, for having caused the pursuer to be wrongously confined in a lunatic asylum, and the defender is assoilzied, the judgment is held as *res judicata* in an action by the pursuer against the defender for having falsely and calumniously certified that the pursuer was insane.

*Mackintosh v. Weir*, 2 R. 877.

The ordinary rules applicable to this plea in other actions apply in defamation, and it therefore calls for no further remark.

(λ) *Lis alibi pendens*.

(λ) *Lis alibi pendens*. This plea also is as stateable in actions for defamation as in others, and is marked by no peculiarities in its application. Thus, when an action for defamation was raised in the Sheriff Court, and another action on the same subject was subsequently raised in the Court of Session, the plea was sustained in the latter case.

*Brown v. Gilfillan*, 4 S. 152.

(μ) Waiver and accepted apology.

(μ) Waiver and accepted apology would appear to be a good defence in this as in other actions.

*Campbell v. Menzies*, 17 D. 1132.

(ν) Bankrupt pursuer.

(ν) Bankrupt pursuer. If the pursuer is bankrupt, the defender should plead that he ought to find caution before he is allowed to proceed, *supra*, p.19. In this case the defender must specify as distinctly as possible when the pursuer's bankruptcy took place.

(ρ) Excessive damages.

(ρ) Excessive damages. The defender should always plead that the damages claimed are excessive. If he intends to lead evidence in mitigation of damages, he must indicate on record the nature of the case he proposes to prove for that purpose.

(c) The Court settles the form of the issue and counter

issue (if any) to be put before the jury. The pursuer submits to the Court the issue he proposes for the trial of the cause, and if the defender is pleading *veritas*, the latter submits a counter issue. After discussion, if need be, the Court approves of the issue (and counter issue) as finally adjusted. In fact the usual manner in which the Court expresses its opinion on whether a pursuer's record is relevant or not, is by allowing him an issue if it be relevant, and refusing an issue if it be not relevant. As for the requisites of issues and counter issues, see *supra*.

(c) Court settles form of issue and counter issue.

(d) The Court is also sole judge of the evidence which may be submitted to the jury. It is not the place here to go into an explanation of the Scottish law of evidence, which does not present any peculiar features in its application to actions for defamation. A note, however, may be made of two or three points which have been decided in actions for defamation with regard to evidence, and which, more than others, have a particular bearing on this class of action.

(d) Court decides what evidence may be submitted to jury.

It seems almost unnecessary to say that the evidence must be evidence that the defender uttered the words complained of, and not others, even though they may have some distant relation to the former.

Utterance proved must be that complained of.

*Ross v. Munro*, Hume 621.

And thus, under an issue whether the defender had stated that the pursuer had become bankrupt or insolvent, it was held not relevant to prove that the defender had asserted that the pursuer had stopped payment.

*Mackenzie v. Murray*, 2 Mur. 154.

Similarly, if the defender pleads *veritas*, he can only prove the truth of the instances he has founded on on record and not of others.

*Sharp v. Wilson*, 5 S.L.R. 444.

The words of style put into issues, "or other words to that effect," after the words complained of are quoted, are

merely inserted to cover slight verbal differences between the language complained of and the language as proved, and will not allow the pursuer to prove completely different words.

*Martin v. McLean*, 6 D. 981.

Evidence of  
utterance in  
foreign  
language.

In that case a pursuer, who complained of accusations against him, proposed to prove that they were made in Gaelic. Nothing was said either in the record or on the issue of the language having been Gaelic and not English, and it was held incompetent for the pursuer to prove the Gaelic words instead of the English. But if the pursuer states on record that the words he complains of were in Gaelic, and gives their English equivalent, he need only set forth in issue the English words, and ask whether words to that effect in Gaelic were uttered of and concerning him.

*Anderson v. Hunter*, 18 R. 467.

Single wit-  
nesses to separ-  
ate utterances.

It has been held sufficient proof of the utterance of an alleged slander when two witnesses spoke each to a different occasion on which it was uttered.

*Landles v. Gray*, 1 Mur. 79.

But this is a doubtful precedent, and can only be accepted where the pursuer complains of a repeated slander. It is obvious that when a pursuer complains of a slander uttered at a particular time, in a particular place, to particular persons, he cannot prove his case by adducing one witness to its being uttered as specified, and another to its being uttered at another time and in another place.

Utterance must  
be proved to  
have been  
made to some  
of the parties  
specified.

The slander must be proved to have been uttered in presence of some of the parties named by the pursuer as having been present, and if it is proved to have been uttered, not in their presence, but in that of others, the verdict will be for the defender.

*Broomfield v. Greig*, 6 M. 992.

If the pursuer has obtained possession of the original

manuscript containing the defamatory matter of which he complains, and the defender denies his authorship, *comparatio literarum* may be resorted to in order to fix the writing on the defender. But this method of proof, distrusted in other classes of actions, is not in great repute in those for defamation.

*Comparatio literarum* to prove authorship.

*M'Donald v. M'Donald*, Borth. 388.

It should be noticed that in actions for defamation, although the pursuer puts his character in issue, the defender does not, and if anything is said against his character, evidence may be brought to rebut the charge.

Defender may set up his character if attacked by pursuer.

*Hyslop v. Miller*, 1 Mur. 43.

This case, however, must not be read as in any way barring a pursuer from leading evidence to show that the defender had ill-will against him. And probably in all well-conducted trials, the judge would not allow evidence to be led by the pursuer to vilify the defender, and thus the necessity of the defender leading rebutting evidence will be obviated.

(e) At the trial. The judge's province is to collect fairly and lay before the jury the evidence brought out by the witnesses, and leave the jury to decide on the evidence what are the real facts of the case, and to give the jury all necessary directions in law. The judge's province goes so far that he may tell the jury that there is no evidence to support the pursuer's case; or he may tell the jury that there is no evidence to justify the innuendo put upon the words used, although the Court may have previously decided that the words were possibly susceptible of the innuendo. *p. L. J. C. Moncreiff*.

(e) Judge's duties at the trial.

Judges may tell jury there is no evidence to support pursuer's case.

*Johnstone v. Dilke*, 2 R. 836.

(f) The jury having given a verdict, it is for the Court to apply it by decerning against the defender for the damages awarded if the verdict is in favour of the pursuer, and by assolilzeing the defender if the verdict is in his favour. It is also for the Court to decide on any ambiguity which may

(f) Court applies verdict.

Ambiguous verdict.

exist in the jury's verdict, though a jury will rarely be dismissed by a judge until it has given an unequivocal verdict. If the verdict be equivocal, it must be set aside and a new trial granted.

*Florence v. Mann*, 18 R. 247.

(g) Procedure subsequent to verdict given is in hands of the Court.

(g) The procedure subsequent to the verdict being given is wholly within the province of the Court. It is not intended here to explain this procedure, which is identical with that in other actions tried by jury.

New trial.

Grounds for granting.

A new trial may be ordered by the Court on any of the recognised grounds for ordering a new trial when a case has been decided by jury, viz.—(1) that the verdict is contrary to, or unsupportable by, the evidence; (2) that the presiding judge gave a misdirection in law to the jury, or that evidence was admitted which was incompetent, or refused which was competent; (3) that the party applying for the new trial has obtained fresh evidence—*res noviter veniens ad notitiam*; (4) that the party applying for the new trial was surprised at the former one by evidence of matters not mentioned on the other party's record; (5) that the jury committed irregularities; (6) that the verdict is ambiguous; and (7) that the damages awarded are excessive.

(1) Verdict contrary to evidence.

(1) To justify the Court in ordering a new trial on the ground that the verdict is contrary to evidence, the result arrived at by the jury must be shown to be "inconsistent with any reasonable view that can be taken of the evidence." *p. L. Cowan*.

*Milne v. Bauchope*, 5 M. 1114.

But if the case is one of privilege, where the pursuer requires to prove malice and want of probable cause, and he does not do so, the Court will order a new trial.

*Lightbody v. Gordon*, 9 R. 934.

(2) Misdirection of the presiding judge.

(2) It is a perfectly good ground for obtaining a new trial that the judge has misdirected the jury in the law, or that



evidence was admitted which was incompetent, or that evidence was refused which was competent. But a defender will not be allowed a new trial on the ground of the wrongful admission of evidence if he failed at the first trial to take objection to it, it being incompetent evidence.

*Ritchie v. Barton*, 10 R. 813.

(3) The Court is unwilling to grant a new trial on the ground of *res noviter veniens ad notitiam*, unless the party applying could not well have obtained the evidence earlier, and the evidence itself is very conclusive in favour of the party proposing to adduce it. Only in one case in Scotland, in an action for defamation, has a new trial been applied for, among other reasons, on this ground, and the application was in that case refused. (3) *Res noviter*.

*Fletcher v. Wilsons*, 12 R. 683.

(4) The Court is unwilling to grant a new trial on the ground that the party asking for it was surprised at the former trial by evidence on matters which the other party had not given notice of on record. Evidence of this kind ought not to be admitted by the presiding judge, and that it is not often so admitted is proved by the fewness of the instances in which a new trial has been asked for on this ground. There is no case of defamation reported in our books where this was made the reason for an application for a new trial. (4) *Surprise*.

(5) If the jury have committed irregularities, that is a good ground for obtaining a new trial. (5) *Irregularities by jury*.

*Sutherland v. Prestongrange Coal Co.*, 15 R. 494.

As when one of their number went to inspect the *locus*, which the others did not see. But a subsequent statement by jurymen that their verdict was not accurately expressed, is not a good ground for granting a new trial.

*Pirie v. Caledonian Railway Co.*, 17 R. 1157.

(6) Instances of ambiguous verdicts are rare, but if one is (6) *Ambiguity in verdict*.

given and accepted by the judge, the court will not interpret it but order a new trial.

*Florence v. Mann*, 18 R. 247.

(7) Excessive damages.

(7) If the Court is of opinion that the jury has awarded excessive damages it will order a new trial. But it is usual now for the Court to intimate to the pursuer that it will order a new trial unless he accepts a specified sum in name of damages which the Court names.

*Wright v. Outram*, 17 R. 596.

*Ritchie v. Barton*, 10 R. 813.

*Johnstone v. Dilke*, 2 R. 836.

II. Questions of fact for the jury.  
Jury decides whether words were uttered by defender of pursuer, and whether they are defamatory.

II. Questions of fact for the jury. The jury is the judge of what are the facts of the case. In every case, before giving a verdict for the pursuer, the jury have to decide whether the language complained of was uttered by the defender or some one for whom he is responsible, and of and concerning the pursuer, and they have further to decide whether it was false and calumnious; in other words, whether it was defamatory.

*p. L. Adam—Waddell v. Roxburgh*, 31 S.L.R. 721.

*p. L. P. Inglis—Sexton v. Ritchie*, 17 R. 680.

*p. L. J. C. Hope—Kennedy v. Baillie*, 18 D. 138.

If the words are in their primary sense defamatory, and the pursuer has averred that they are false, the jury must find them so unless the defender has offered to prove their truth.

*Ross v. M'Kittrick*, 14 R. 255.

Jury decides whether innuendo is proved.

If the words are not in their primary sense defamatory, and the pursuer has had to put an innuendo on them, the jury have to decide whether the innuendo is proved. *p. L. Adam.*

*Bruce v. Leisk*, 19 R. 482.

*M'Douall v. Guthrie*, 15 D. 778.

*Rodgers v. Macewen*, 10 D. 882.

But the Court will interfere if the jury put an unreasonable construction on the words. *p. L. Shand.*

*Godfrey v. Thomsons*, 17 R. 1108.

The jury, like the Court, in judging of the meaning of an alleged defamatory passage, must look at the whole statement in which it is contained, and must not single out isolated words detached from their surroundings.

*Morthland v. Cadell*, 4 Pats. Apps. 385.

p. L. P. Boyle— *Rodgers v. Macewen*, 10 D. 882.

p. L. P. Robertson—*Falconer v. Docherty*, 20 R. 765.

In privileged cases, although the question of whether the case is privileged or not, is for the Court, p. L. Moncreiff,  
*Torrance v. Leaf*, 13 S. 1146,

Jury decides whether malice and want of probable cause existed.

it is for the jury, when informed by the judge of what malice and want of probable cause in their legal sense consist, to decide whether, in that sense, they actually existed in the defender's case then before them.

p. L. C. C. Adam—*Maclean v. Fraser*, 2 Mur. 353.

p. L. Ivory— *Smith v. Green*, 15 D. 549.

p. L. Benholme— *Bell v. Black*, 38 Scot. Jur. 412.

p. L. Mure— *Ritchie v. Barton*, 10 R. 813.

Lastly, it is for the jury, under the guidance of the judge, to assess the damages in the event of their finding a verdict in favour of the pursuer.

Jury assesses damages.

## CHAPTER XXII

### INTERDICT AS A REMEDY

Interdicting defamatory publications—Not in favour—Examples where interdict refused—Refusal of interdict no bar to damages—Examples where interdict was granted—English cases—Interdict may be granted if person publishing has no property in document.

Interdicting  
defamatory  
publications.

OCCASIONALLY attempts have been made to prevent the circulation of alleged defamatory statements by interdict. This method is not in favour, and for the reason given by Lord Cottenham. "That Act (15 Geo. IV. c. 42)," now 6 Geo. IV. 120, "appoints a jury as the proper tribunal for " trial of injuries to the person by libel or defamation, and " the liberty of the press consists in the unrestricted right of " publishing subject to the responsibilities attached to libels, " public or private. But if the publication is to be anticipated " and prevented by the interdict of the Court of Session, the " jurisdiction is taken from the jury and the right of unre- " stricted publication is destroyed."

Not in favour.

*Newton v. Fleming*, 6 Bell's App. 175.

Examples  
where inter-  
dict refused.

Thus where defenders proposed to publish a private correspondence between themselves and others, and the record and proof in an action, the Court refused to interdict them, although it was averred that the defenders had not obtained the permission of the complainers whose letters were to be published.

*White v. Dickson*, 8 R. 896.

And again the Court refused to interdict the publication of a report of proceedings in a foreign Court, the report not being alleged to be unfair.

*Riddell v. Clydesdale Horse Society*, 12 R. 976.

But the refusal of the Court to grant interdict will not debar any person who complains of injury from the publication bringing an action of damages in respect thereof. See opinions in

Refusal of interdict no bar to damages.

*White v. Dickson*, 8 R. 896.

On the other hand, the Court interdicted the publication of handbills imputing improper business conduct to the complainers.

Examples where interdict was granted.

*British Legal, etc. v. Pearl Life, etc.*, 14 R. 818.

But in that case, when the handbills were first complained of, the respondents did not know that such were being circulated by their agents, and when they came to know, although they do not seem to have denied their defamatory character, they allowed the publication to continue.

And in a recent case, where the respondent had been appointed by a Board of Directors to act on a committee of investigation into the affairs and management of a public institution, and his appointment bore that the results of the investigation were not to be published until they had been communicated to and considered by the Board, interdict was granted at the instance of the manager of the institution against the publication of the report of the Committee of Investigation, which, it was averred, contained matter injurious to the manager. But when the report had been communicated to and considered by the Board, the interdict was not allowed to continue.

*Martin v. Nisbet*, 1 S.L.T. 293, 371.

In England the question of how far interdict (injunction) will be granted against the publication of what is alleged to be defamatory has been a good deal discussed, and in a recent

English cases.

case it was held that interdict will only be granted in the clearest cases where if a jury did not find the matter complained of to be libellous, the Court would set aside the verdict as unreasonable; and that where the respondent swears he will be able to justify the libel, and the Court is not satisfied that he may not be able to do so, no interdict will be granted.

*Bonnard v. Perryman*, L.R. 1891 ; 2 C. 269.

*Monson v. Tussauds, Limited*, L.R. 1894, 1 Q.B. 671.

Interdict may be granted if person publishing has no property in document.

It should be noticed that interdict against a threatened publication may be obtained on quite another ground than that it is defamatory, viz. on the ground that the publisher is not the owner of the document, and has no other title which would give him the right to publish. This ground for interdict, if put forward by a person having a right or title in the document about to be published, may well prevail.

1 *Bell's Com.*, 111.

*Caird v. Sime*, 14 R. (H. of L.) 37.

# NOTE

## ON THE

### LAW OF DEFAMATION IN ITS RELATION TO NEWSPAPERS

The Press is free—The position of the law of defamation towards newspapers—L. Deas in *Drew v. Mackenzie*—Law of defamation the same for newspapers as for others—Branches of privilege specially important to newspapers—What reports are privileged—*Broune v. M'Farlane*—Newspapers' privilege of criticism—*Brims v. Reid*—Right of party suing newspaper to recover manuscript to aggravate damages—*Cunningham v. Duncan*.

“ THE Press is free; but the party who publishes is responsible for any libel or defamation of which he may be guilty. The conduct of a public man (a member of the Government, a functionary under Government, or a member of Parliament) is open to animadversion and censure, but that must be confined to his public character. A person attending as a member of a public meeting, and taking part in the proceedings, is subject to the same animadversion on his public conduct, and has the same protection of his private character. An author is liable to criticism and animadversion in his capacity as an author, but protected as other men are in his private character.”

The Press is free.

*Bell's Prins.*, 2055.

“ By the law of the country, every one is free to publish

"but is liable to prosecution or action for what he so publishes." *p. L. C. C. Adam.*

*Alexander v. Macdonald*, 4 Mur. 94.

The position  
of the law of  
defamation  
towards  
newspapers.

In short, in Scotland the press enjoys no privilege to publish defamatory matter, which is not equally enjoyed by any person in the country. The position of newspapers with respect to the law of defamation was discussed at considerable length in

*Drew v. Mackenzie*, 24 D. 649.

L. Deas in  
*Drew v. Mac-*  
*kenzie*

L. Deas in that case said: "The question remains, is there anything in the position of a public journalist—the editor of, or contributor to a newspaper—to exempt him from liability for such a libel? I am not aware that there is.

"In regard to politics and public policy, and the political principles of public men, the law of this country allows the greatest possible freedom of discussion. The liberty of the press upon these and kindred matters is invaluable and well established; but, as regards private character, the conduct and principles of an individual, whether he be a merchant, a professional man, or a private gentleman, the law by no means allows the same latitude. It would be a total mistake to suppose that the editor of a newspaper, who sits behind a curtain like another veiled prophet, is entitled to vote himself public accuser, to the effect of calling every member of society to account for his misdeeds, and to confer upon every anonymous contributor whom he admits into his columns the same privilege. A self-constituted public accuser must often have a very imperfect knowledge of the facts, and can seldom afford to the accused either the proper opportunity or the proper tribunal for establishing his defence. The accusation and the defence can seldom come forth simultaneously; and, in short, freedom of the press, in the sense of being free to say of the character and conduct of individuals in private



“ life, whatever the ardent and enthusiastic editor of a newspaper believed, even conscientiously, to be for the interests of truth and morality, would soon be found to be intolerable oppression. . . . The editor of a newspaper, particularly of a daily newspaper, is entitled to great consideration, and I would almost say indulgence, on account of the multifarious nature of his duties and the pressure upon his time; and this consideration must always be of weight in fixing the amount of damages, and may even go to a total absolver, if prompt apology and explanation have been made.”

The law relating to defamation is then the same for newspapers as for persons in ordinary positions. What would be defamatory if uttered by the one is defamatory if uttered by the other. The same defences to an action are open to newspapers as to others. There is no special privilege to journalism.

Law of defamation the same for newspapers as for others.

*p. L. O. Fraser—Coghill v. Docherty*, 19 S.L.R. 96.

*p. L. M'Laren—Neilson v. Johnston*, 17 R. 442.

It seems, however, to have been held in America that if a newspaper publishes a contributed article apparently quite innocuous, it will not be liable for a libel hidden beneath the apparently innocent words, if those in control of the newspaper were ignorant of its existence.

*Smith v. Ashley*, 45 Amer. Decis. 216.

This rule, however, must be regarded with grave doubt; injury not malice is the true foundation of a libel action, and while the defender's *bona fides* may mitigate, it will not absolve from damages.

There are, however, special branches of privilege which are more important from a newspaper point of view than others, and it may be well to recapitulate with regard to them what has already been explained in dealing with the subject at large.

Branches of privilege especially important to newspapers.

What reports  
are privileged.

There is no doubt that a newspaper, if it gives a fair and accurate report of certain proceedings publicly transacted, is privileged, so that it will not be liable for any defamatory statement made in the report. The reports which are thus privileged are:—

- (1) Reports of proceedings in Parliament.

*Wason v. Walter*, 4 L.R., Q.B. 73.

- (2) Reports printed by order of either House of Parliament.

3 & 4 Vict. c. 9, s. 1.

- (3) Probably reports of proceedings in the General Assembly of the Established Church, and the other Courts of that Church when the proceedings were open to the public, and were within the proper jurisdiction of those Courts. The case of

*Porteous v. Izat*, M. 13937,

if it can be held as definitely deciding to the contrary, must now be regarded with great suspicion.

- (4) Reports of proceedings in the Courts of the land, if published contemporaneously.

*p. L. Ivory—Drew v. Mackenzie*, 24 D. 649.

*p. L. Kyllachy—Wright v. Outram*, 16 R. 1004.

But reports of what is contained in papers before the Court, which have not been read in open Court, do not seem to enjoy the privilege.

*Richardson v. Wilson*, 7 R. 237.

*Macleod v. Justices of the Peace of Lewis*, 20 R. 218.

- (5) Reports of what is published in official documents open to the public.

*Newton v. Fleming*, 6 Bell's App. 175.

*Outram v. Reid*, 14 D. 577.

*Taylor v. Rutherford*, 15 R. 608.

*Buchan v. N. B. Railway Co.*, 21 R. 379.

There is more doubt as to the privilege of newspapers in

reporting proceedings other than those just mentioned, and yet publicly transacted. The protection given to newspapers by the Statute,

51 & 52 Vict. c. 64,

in giving fair and accurate reports of public meetings, of meetings of local governing bodies to which the public are admitted, and of official intimations (quoted *supra*, p. 185), does not extend to Scotland. But there is reason to believe that our common law will extend a privilege to such reports (see *supra*, p. 186), and although there is no recent decision on the point, the two cases of

*Finlay v. Ruddiman*, M. 3436,

*Farishes v. Davidson*, Hume 634,

considered *supra*, pp. 186, 187, seem to support this view.

On the other hand, newspapers will not enjoy any particular privilege in giving a fair and accurate report of what is not publicly transacted,

*Finlay v. Ruddiman*, M. 3436,

and if they give such a report, and are sued for defamatory matter in it, they can plead no privilege other than *veritas*,—not of the truth of the report, but of the truth of the statements reported. In fact a newspaper giving a report of an alleged fact may be debarred from pleading matters which could be pleaded by the person who supplied them with the report. And thus a newspaper which refused to reveal the name of a correspondent who supplied it with information was held not entitled to prove facts and circumstances known to the correspondent in mitigation of damages.

*Browne v.  
M<sup>r</sup> Farlane.*

*Browne v. M<sup>r</sup> Farlane*, 16 R. 368.

The principle of this decision is by no means clear. A newspaper proprietor who is sued rarely knows anything of a defamatory statement until after it is published. In one sense his liability is vicarious. He acts through agents. He takes liability for their actings, and it is difficult to see

why he should not be able to plead their knowledge in defence, and what difference the revelation of a name should make on his liability. If the statements made by the newspaper in *Browne v. M'Farlane* had been uttered orally, and the utterer had been sued for them, there is no reason to doubt that no enquiry would have been made whence the utterer's information came, and that he would have been permitted to lead the evidence which in that case the defender was not allowed to adduce. The decision in *Browne v. M'Farlane's* case might be justified in an action against the publisher of a book, where the contract between writer and publisher is one by which the latter, as an independent party, undertakes to publish what the former writes. But a newspaper proprietor is a principal, his informants are his agents, and, if he is to be made liable for their mistakes, there seems little justice and no reason in not allowing him the benefit of their knowledge.

Newspapers'  
privilege of  
criticism.

A newspaper enjoys the privilege of criticism, as explained *supra*, pp. 182-185. It would also seem to have a right to discuss the public affairs of its locality, and to have the ordinary privilege of persons in the locality to do so, so long as the discussion takes place in its leading columns.

*Brims v. Reid.* But if the discussion occurs in what bear to be letters addressed to it from the outside, it loses this privilege if it refuses to disclose the name of the writer.

*Brims v. Reid*, 12 R. 1016.

*M'Kerchar v. Cameron*, 19 R. 383.

These cases have been discussed *supra*, p. 171.

Right of party  
suing news-  
paper to  
recover manu-  
script to  
aggravate  
damages.

The only other point which it is necessary to notice in the application of the law of defamation to newspapers is, that if a newspaper publishes a series of anonymous letters, which are complained of as defamatory, and the pursuer avers that, though bearing to be written by different persons,

they were written in the newspaper office itself, he will be allowed a diligence to recover the letters to prove this averment in order to augment damages.

*Cunningham v. Duncan*, 16 R. 383.

L. Shand in this case seemed to hesitate as to the soundness of the view adopted by the Court, and that view has certainly little to commend it. Allowing a diligence on such averments is a direct encouragement to persons to make them with the ulterior motive of discovering from the manuscript who the writer of it was. Moreover, it is most questionable whether anything should be proveable in aggravation of damages which cannot be shown to have increased the injury done. No additional injury can be done to a man by the mere fact that he has only one instead of many defamers. If a newspaper admits responsibility for what it publishes, there is no reason for seeking for the author. The newspaper can be treated as the author, and damages can be awarded accordingly. The fact is that when a pursuer is allowed to recover documents in this way to aggravate damages, the action for libel, which is properly a purely civil one now, is converted into a penal one. The defender is to be made to pay more, not because of the additional injury he has inflicted on the pursuer, but because of his malice in publishing. In England it has been held that the pursuer is not entitled to discover the author.

*Cunningham  
v. Duncan.*

*Gibson v. Evans*, L.R. 23 Q.B.D. 384.



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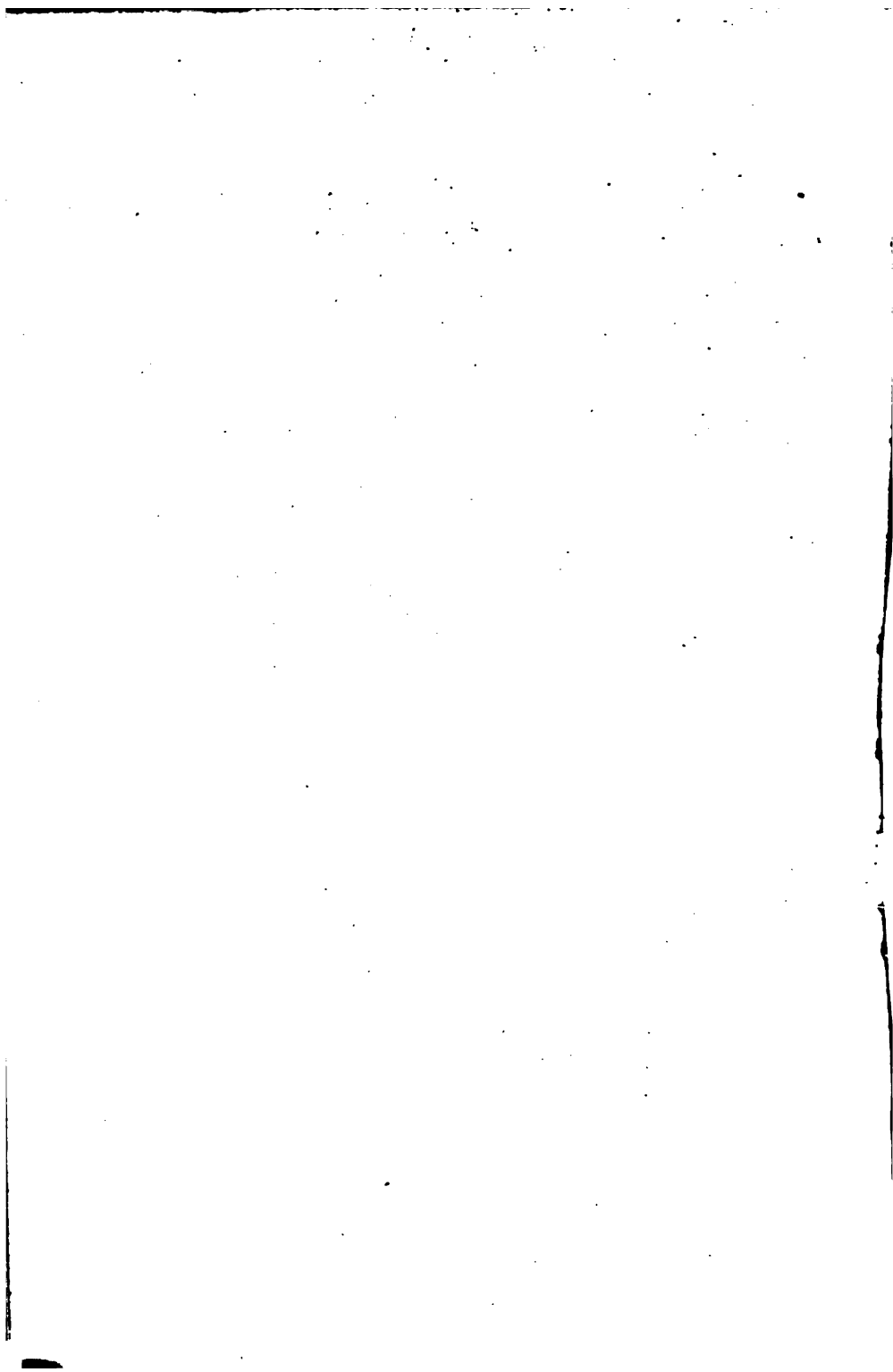
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